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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

LARRY ROCKEFELLER; HOLACE MORANCI; NEIL MORANCI; DONNA MORANCI; MARY PARRISH; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER; CORNELIUS P. DUGAN; and STEVE FORBES,

Petitioners,

vs.

WILLIAM POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE; NEW YORK STATE BOARD OF ELECTIONS et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Second Circuit err by failing to apply strict scrutiny in its review of a New York law governing ballot access for the 1996 Republican presidential primary which imposed upon voters and candidates in urban Congressional Districts a percentage "modicum of support" signature requirement six times greater than that imposed upon voters and candidates in rural and suburban districts?

2. If strict scrutiny analysis does apply, has the State proffered a compelling interest to justify the six-fold disparity in signature requirements which discriminates against voters and candidates in urban districts?

3. Is the law's discriminatory treatment of candidates and voters in urban districts, as compared to identically situated voters and candidates in rural and suburban districts, supported by even a rational basis?

PARTIES TO THE PROCEEDING

The plaintiffs are Larry Rockefeller, Holace Moranci, Neil Moranci, Donna Moranci, Mary Parrish, Lugenia Gordon, Helen Dalley, Betsy Webster, Betsy R. Blattmachr, Nancy Burner, and Cornelius P. Dugan. Steve Forbes, as an individual and in his capacity as a candidate for President, is a plaintiff-intervenor.

The defendants are William Powers, Chairman, New York Republican State Committee; New York Republican State Committee; New York State Board of Elections; Owen T. Smith, Carol Berman, Evelyn J. Aquila, and Helena Moses Donohue, Commissioners, New York State Board of Elections; New York City Board of Elections; Douglas Kellner, Vincent Cuttita, Paul Mejias, Vincent J. Velella, Weyman A. Carey, Ronald J. D'angelo, Seymour Sheldon, Kathleen Wagner, Gertrude Strohm, and Ferdinand Marchi, Commissioners, New York City Board of Elections; Erie County Board of Elections; Roger Blackwell and Ralph Mohr, Commissioners, Erie County Board of Elections; Nassau County Board of Elections; Stephen Sabbeth, Commissioner, Nassau County Board of Elections; Suffolk County Board of Elections; Gerald Edelstein and Gerald Berger, Commissioners, Suffolk County Board of Elections; Monroe County Board of Elections; M. Betsey Relin and Ronald J. Starkweather, Commissioners, Monroe County Board of Elections; National Republican Committee.

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Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit herein, issued on December 21, 1995, vacating and reversing a preliminary injunction granted by the United States District Court for the Eastern District of New York on December 1, 1995 and expanded by that court on December 13, 1995.

Pending consideration of the petition for certiorari herein, petitioners respectfully request that the mandate of the Second Circuit be stayed and, if necessary, recalled, and that the preliminary injunction issued by the District Court be reinstated in connection with the New York State Republican Presidential primary election scheduled for March 7, 1996. *See Norman v. Reed*, 498 U.S. 931 (1990)(granting stay).

OPINIONS BELOW

The opinions below have not yet been reported officially. The opinion of the United States Court of Appeals for the Second Circuit, issued on January 18, 1996, is reported unofficially at 1995 U.S. App. LEXIS 39107 (2d Cir.) and 1995 WL 790831 (2d Cir.); a copy of the decision is reprinted in full as Appendix B to this petition. 3a-37a. The opinion of the District Court for the Eastern District of New York is reported unofficially at 1995 U.S. Dist. LEXIS 18742 (E.D.N.Y.) and 1995 WL 744927 (E.D.N.Y.); a copy of the decision is reprinted in full as Appendix C to this petition. 38a - 57a. Copies of the orders of the United States District Court for the Eastern District of New York, issued on December 13, 1995 and December 1, 1995, are reproduced, respectively, as Appendix D and Appendix E to this petition. 58a-61a; 62a-64a.

JURISDICTION

The United States Court of Appeals for the Second Circuit ordered judgment entered forthwith on December 21, 1995, vacating the preliminary injunction issued by the court below. 1a-2a. The Second Circuit's opinion was issued on January 18, 1996. The certiorari jurisdiction of the Court is invoked under 28 U.S.C. Sec. 1254(1).

The application to stay or recall the mandate of the Second Circuit is premised on 28 U.S.C. Sec. 2101(f); 28 U.S.C Sec. 1651; and Rules 22 and 23 of the Rules of the United States Supreme Court. Pursuant to the rules of this Court, a recall of the mandate has been sought below. As of the filing of this petition, no action on the recall application has occurred. In view of the imminence of the New York State Republican

Presidential Primary, petitioners have filed this application to recall the mandate in the belief that the pending Second Circuit application has virtually no chance of success.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution, made applicable to the States by the Fourteenth Amendment, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Chapter 586(2) of the Laws of New York, enacted on August 8, 1995, governs the administration of the 1996 New York State Republican Presidential primary election. Copies of Chapter 586(2), and New York Election Law Sections 6-136(2)(g) and (3), incorporated by reference into Chapter 586(2), are reproduced in Appendix F and Appendix G. 66a-69a; 70a-81a.

In order to appear on the Presidential primary ballot in a given Congressional District, Chapter 586(2) requires that a putative candidate for delegate must submit signatures of

1,250 qualified Republican voters residing in the Congressional District, but not more than 5% of the eligible electorate.

STATEMENT OF THE CASE

Petitioners Larry Rockefeller, Holace Moranci, Neil Moranci, Donna Moranci, Mary Parrish, Lugenia Gordon, Helen Dalley, Betsy Webster, Betsy M. Blattmachr, Nancy Burner, and Cornelius P. Dugan are enrolled Republicans eligible to vote in the 1996 New York State Republican Presidential primary. Petitioner Steve Forbes is a candidate for the 1996 Republican Presidential nomination.

This petition and the accompanying stay application should be granted to permit delegates pledged to support the candidacy of Steve Forbes to appear on the New York State Republican Presidential primary ballot in the 15th Congressional District representing the residents of Harlem. Unless the decision of the Second Circuit is stayed, Republican voters in Harlem will be denied any opportunity to vote for a Presidential candidate, while identically situated Republican voters throughout New York State will enjoy a choice between and among two or three candidates (Patrick Buchanan, Robert Dole and Steve Forbes).

The plight of Republican voters in Harlem is directly linked to discriminatory ballot access rules imposed by New York law. It is uncontested that, pursuant to Chapter 586(2) of the Laws of New York, Republican voters in Harlem (and five other urban Congressional Districts) must submit signatures equal to 5% of the eligible electorate in order to qualify a candidate for the Republican Presidential primary ballot, while the vast bulk of Republican voters elsewhere in New York State must submit signatures equal to approximately 1% of the eligible electorate.

Confronted with such blatant discrimination against Republican voters residing in urban Congressional Districts, the District Court (Korman, J.) imposed a signature ceiling of approximately 1.4% of the eligible electorate in an effort to

equalize the ballot access requirements for all Republican voters.[1] 38a-65a. Pursuant to the ground rules set forth in Judge Korman's order (58a-61a), at least two[2] and possibly three[3] delegate slates would have qualified to appear on the Republican Presidential primary ballot in Harlem. However, once the Second Circuit vacated Judge Korman's order, thereby reinstating the discriminatory 5% requirement of Chapter 586(2), neither Forbes nor Buchanan delegates were able to assemble signatures equal to 5% of the eligible electorate in Harlem, leaving the area's qualified Republican voters without an electoral choice on primary day.[4] If the Court stays the Second Circuit's judgment vacating Judge Korman's order, a contested Republican Presidential primary election will take place in Harlem. If, however, the Court permits the Second Circuit's judgment to stand, the Republican voters of the 15th Congressional District will be denied the right to vote in the 1996 Republican Presidential primary.

A. The Discriminatory Ballot Access Rules Imposed by Chapter 586(2)

On August 8, 1995, the New York State Legislature enacted Chapter 586, governing the conduct of the March 7, 1996 Presidential primaries in New York State. 70a-81a. As has been the practice in New York State in recent Presidential primary years, the New York State legislature attempted to codify each major party's preferred method of organizing a

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[1] Judge Korman selected the 1.41% figure because it is the requirement imposed by Chapter 586(2) in New York's "mean" Congressional District -- the 13th CD. 55a-56a.

[2] Robert Dole and Steve Forbes each clearly satisfy the 1.4% minimum set by Judge Korman.

[3] Delegates pledged to support Patrick Buchanan filed designating petitions in the 15th Congressional District, as well. At this date, it is unclear whether the Buchanan signatures would satisfy the 1.4% requirement.

[4] Under New York law, when a single candidate qualifies for a primary, the election is cancelled. N.Y. Election Law §6-160 (2) (McKinney's 1978).

Presidential primary.[5] As expected, by letter dated October 31, 1995, the New York Republican State Committee formally notified the New York State Board of Elections that it would designate and elect Republican National Convention delegates in the Republican Presidential primary pursuant to Chapter 586(2). 82a.

Under Chapter 586(2), three delegates to the Republican National Convention are to be elected from each of the New York's thirty-one Congressional Districts.[6] Chapter 586(2)'s ballot access requirements are explicitly borrowed from New York Election Law Sections 6-136(2)(g) and (3) (collectively, "Section 6-136"), governing Congressional elections. 66a-69a. Section 6-136 requires that, in order to obtain a position on the ballot in a given Congressional District, a slate of delegate-candidates must obtain the signatures of 1,250 or 5% of the enrolled Republican voters, whichever is less. Signatures must be obtained during a 37-day period from November 28, 1995 through January 4, 1996. Enrolled members of the party may sign only one designating petition.

While Congressional Districts are equally apportioned on the basis of raw population, enormous variations exist in the number of enrolled Republicans in each Congressional District. For example, in Nassau County, one Congressional District -- the 3d -- counts 158,087 enrolled Republicans, while in Kings County, a nearby Congressional District -- the 11th -- has 11,814 enrolled Republicans, and the 15th, representing the residents of Harlem, has 15,561 enrolled Republicans. Since, pursuant to Chapter 586(2) and Section 6-136,

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[5] The Democratic Party's preferred method of organizing a primary set forth in Chapter 586(3) requires candidates for delegate to submit signatures equal to .5% of the eligible electorate.

[6] New York State has been allocated 102 delegates at the Republican National Convention. The New York State Republican Party has determined that 93 delegates are to be elected from each of the states' 31 Congressional Districts, with the remaining 9 delegates chosen at large by the State Committee.

candidates for delegate in each Congressional District must obtain a fixed number of signatures (1,250, subject to the 5% ceiling), the percentage showing of support needed to place a candidate on the ballot varies widely from Congressional District to Congressional District.[7] For example, in the 3d

[7] The percentage of the eligible electorate required to place a Presidential candidate on the Republican primary ballot in each of New York's 31 Congressional Districts is:

District	*Registered Republicans*	*% of Electorate Required*	*Rank*
3	158,097	0.79	1
22	153,824	0.81	2
27	148,319	0.84	3
4	148,013	0.84	4
23	143,555	0.87	5
31	137,952	0.91	6
24	136,788	0.91	7
1	129,111	0.97	8
25	124,260	1.01	9
26	116,360	1.07	10
19	114,008	1.10	11
29	113,561	1.10	12
28	112,797	1.11	13
2	112,442	1.11	14
20	102,232	1.22	15
13	88,350	1.41	16
21	86,470	1.44	17
5	85,213	1.47	18
18	85,062	1.47	19
30	80,970	1.54	20
14	52,555	2.38	21
9	52,511	2.38	22
7	46,303	2.70	23
8	33,247	3.76	24
6	25,457	4.72	25
17	23,090	5.00	26
12	21,215	5.00	27
10	17,114	5.00	28
15	15,561	5.00	29
16	14,852	5.00	30
11	11,814	5.00	31

The above chart was initially prepared by Judge Korman. 41a-42a.

CD, representing Nassau County, a showing of support from .79% of the enrolled Republicans (1,250/158,000) is a sufficient "modicum of support" to warrant a place on the ballot for a Presidential contender's slate of delegates. By contrast, in the 15th CD, representing the residents of Harlem, a relative showing of support more than six times greater -- 5% of the Republican electorate -- is the required "modicum of support" necessary for access to the ballot.

The predictable effect of the higher 5% level of support required in urban Congressional Districts such as the 15th CD is that the Republican voters in those districts enjoy fewer choices in the Republican Presidential primary than Republican voters in suburban and rural constituencies where a showing of approximately 1% will suffice. That is exactly what has occurred in connection with the 1996 Republican Presidential primary. Republican voters residing in Harlem, faced with a discriminatory 5% ballot access requirement, will have no choice on election day. Most Republican voters in Congressional Districts favored with a 1% requirement will have three choices.

B. The Decisions Below

1. The District Court Injunction

Confronted with such blatant inequality in the administration of the electoral process, the United States District Court for the Eastern District of New York (Korman, J.), issued a preliminary injunction on December 1, 1995, enjoining New York election officials from requiring signatures equal to more than 1.4% of the eligible electorate, the modicum of support requirement established by the operation of Chapter 586(2) in the State's "mean" Congressional District -- the 13th CD. A copy of Judge Korman's December 1, 1995 order is set forth in the Appendix at pp. 62a-65a. Judge Korman issued a memorandum opinion and order on December 13, 1995. 38a-57a.

Judge Korman reasoned that New York's decision to impose a 5% modicum of support requirement on urban voters,

while imposing a 1% modicum of support requirement on most suburban or rural voters, constituted a discrimination in the terms and conditions of voting triggering "strict scrutiny" review under the Equal Protection clause. Accordingly, he required New York State to demonstrate a compelling governmental interest justifying the differential ballot access requirements. 44a-51a.

Alternatively, Judge Korman found that New York's use of differential measures of support governing access to the ballot in a single Presidential primary could not survive even rational basis scrutiny. He noted that the New York scheme made it more difficult to obtain a place on the ballot in precisely those urban areas (like Harlem) where the paucity of enrolled Republicans made it more difficult to qualify for the ballot, and easier in those suburban areas where dense Republican registration made it less burdensome. 56a-57a.

2. The Circuit Court's Reversal

On December 21, 1995, a panel of the United States Court of Appeals for the Second Circuit (Jacobs, Calabresi, and Parker, CJJ) heard an expedited appeal from Judge Korman's preliminary injunction. The Second Circuit panel vacated Judge Korman's order from the bench and explicitly ordered the immediate issuance of the mandate, stating that a reasoned explanation for the panel's action would be issued expeditiously. 1a-2a. On January 18, 1996, the panel issued a written opinion. 3a-37a.

The panel's opinion rejected respondents' argument that New York's ballot access rules are non-justiciable because they were enacted at the behest of a political party, noting that the codification of the ballot access rules in a state statute rendered them subject to constitutional review. 16a-22a. The panel declined, however, to subject New York's decision to impose widely differing ballot access requirements in the same primary to strict scrutiny. Instead, the panel held that rational basis scrutiny was appropriate for three reasons. 23a-34a.

First, the panel argued that the adverse impact of the 5% rule on disfavored urban voters was not sufficiently draconian to warrant strict scrutiny. Since, reasoned the panel, so-called 5% districts had occasionally managed to qualify two primary candidates in the past, the voters in such districts were not absolutely barred from primary voting by Chapter 586(2). 26a-28a. The panel explicitly noted that urban residents of 5% districts had never enjoyed a choice among three candidates, although suburban residents of 1% districts often were able to choose among three or more candidates. Such discrimination was not, however, deemed sufficiently grave by the panel to warrant strict scrutiny. 28a-29a.

Moreover, the panel argued that the 1996 New York State Presidential primary was not a single primary election at all, but rather thirty-one separate primary elections held simultaneously in each Congressional District. 29a-30a. Since, reasoned the panel, the same ballot access rules governed all candidates and voters within a single Congressional District, no electoral discrimination triggering strict scrutiny had occurred.

Finally, the panel found that New York's use of differential levels of support in urban versus suburban or rural districts was rational. 35a-37a. First, the panel argued that it was rational for New York to discriminate in favor of rural and suburban districts in order to counter the inherent difficulty of seeking signatures in rural areas of low population density. 37a. Unfortunately, the panel ignored the extraordinary difficulty of seeking signatures in the inner-city, especially in areas with extremely low Republican voter density. Second, the panel held that it was rational for New York to make it harder to get on the ballot in urban districts with few enrolled Republicans because, once ballot access was secured, each urban Republican voter would have a greater relative voice in the electoral outcome. 36a-37a. The panel ignored the fact that, without equal ballot access rules, enhanced electoral power is meaningless, since there will be no one to vote for. It is scant solace to a Republican voter in Harlem to be told on March 7,

1996, that her vote counts more than a suburban voter's when there is no one to vote for.

Finally, the panel's effort to characterize New York's rules as an effort to "liberalize" ballot access is a perversion of reality. 35a-36a. As Judge Korman found, Chapter 586(2) does not establish a 5% requirement that is "liberalized" by a numerical cap. Rather, it applies a 5% test in a discriminatory manner to a small percentage of the Republican electorate residing in urban areas, while permitting the vast majority of Republican voters residing in rural and suburban area to enjoy a 1% requirement. Such a scheme cannot qualify as rational. 41a-43a.[8]

C. The 1996 Republican Designating Process in New York State

Following the Second Circuit's reversal of Judge Korman's injunction on December 21, 1995, the Forbes delegate petitioners made extraordinary efforts to satisfy the 5% hurdle in the six urban Congressional Districts, as well as the 1,250 signature requirement in the remaining twenty-five Congressional Districts, expending more than one million dollars in an effort to obtain a place on the New York State Republican Presidential primary ballot. On January 4, 1996, the Forbes delegate petitioners filed nominating petitions in each of New York's thirty-one Congressional Districts containing sufficient facially valid signatures to satisfy the requirements of Chapter 586(2). Supporters of Senator Robert Dole immediately filed challenges under New York's arcane election laws seeking to disqualify numerous signatures on technical, nonsubstantive grounds. The rules governing the challenge

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[8] On or about February 9, 1996, plaintiffs and plaintiff-intervenor will apply to the District Court for a preliminary injunction against enforcement of Chapter 586(2) on the ground that it imposes an undue burden on political expression in contravention of the First Amendment. That application is a fact-based challenge on a theory expressly not reached by the Second Circuit (*see* 26a n.17), and is entirely separate from the Equal Protection claim pressed here.

process are set forth, *inter alia*, in New York Election Law §§ 6-154 and 16-102.

As of February 7, 1996, sufficient Forbes delegate signatures have been disallowed to bring the signature totals below the 5% number required in the 15th Congressional District. Petitioner Forbes filed designating petitions containing over 900 signatures in the 15th Congressional District. Technical challenges filed by supporters of Sen. Dole resulted in the invalidation of over 400 signatures, bringing the total below the 5% barrier established by Chapter 586(2), but comfortably above the 1.41% ceiling established by Judge Korman's injunction.[9] Thus, unless the 5% requirement is lifted, Forbes delegates will not appear on the ballot in Harlem.[10]

Similarly, delegates pledged to Patrick Buchanan made intense efforts to qualify for the New York State Presidential primary ballot. Despite the efforts of 700 dedicated volunteers, delegates pledged to Buchanan were able to satisfy Chapter 586(2) in only a fraction of the state's 31 Congressional Districts. Unless the 5% requirement is lifted, Buchanan delegates will appear on the ballot in only one Congressional District in the City of New York, representing Staten Island and a portion of Brooklyn. Not surprisingly, Buchanan was unable to obtain sufficient signatures in any of the urban 5% Congressional Districts.[11]

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[9] *Proceedings in the New York City Board of Elections concerning Forbes Designating Petitions, Republican Presidential Primary (1996).*

[10] The tortuous challenge period that characterizes New York's election process will not be completed until shortly before the Republican Primary. As of the filing of this petition, Forbes delegates have been denied access to the ballot in the 15th Congressional Districts. Contested challenges involving other Congressional Districts are also pending. This petition and application focusses on the 15th Congressional District because the discriminatory impact of Chapter 586(2) on the voters of the 15th CD is clearly ripe for review.

[11] The most damning testimony to the undue burden on ballot access imposed by Chapter 586(2) is the fact that the remaining Republican Presidential candidates made no effort to compete for New York's 93 elected

(Footnote continued)

Thus, at a minimum, the existence of a contested Republican Presidential primary in the 15th Congressional District turns on the Court's response to this petition and application.

REASONS FOR GRANTING THE WRIT

I. The Circuit Court Applied the Incorrect Standard of Review

A. Discriminatory Ballot Access Rules Favoring Rural and Suburban Voters at the Expense of Urban Voters Must Be Subjected to Strict Scrutiny

Judge Korman's recognition that New York State may not administer a Presidential primary election in which Republican voters residing in six urban Congressional Districts must file signatures equal to 5% of the electorate in order to place a Presidential candidate on the ballot, while identically situated Republican voters residing in rural and suburban districts may file signatures equal to approximately 1% of the electorate, was clearly correct. As Judge Korman recognized, this Court's decision in *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979), requires that discriminatory ballot access rules favoring rural and suburban voters at the expense of urban voters must be subjected to strict scrutiny under the Equal Protection clause. 44a-47a.

Unfortunately, the Second Circuit panel decision adopted an indefensibly narrow view of the duty to protect equal access to the democratic process. Declining to decide whether the burden on voters must be "severe," or merely "substantial," the panel erroneously held that urban voters subject to the discriminatory 5% burden do not suffer a "significant" dilution of the right to vote. 24a-29a. The panel was wrong on three levels.

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delegates, recognizing that the ballot access laws were so onerous that they were virtually impossible to satisfy.

Most obviously, the panel was demonstrably wrong when it opined that application of the discriminatory 5% rule to the Republican voters of Harlem would not "substantially" affect their right to vote in the 1996 Republican Presidential primary election. In fact, applying the 5% standard to the 15th Congressional District means that no election will take place on March 7. Under the 5% standard imposed by Chapter 586(2), Republican voters residing in Harlem will not have an opportunity to express any choice on election day. If, however, a non-discriminatory ballot access standard similar to the 1.4% requirement imposed by Judge Korman were applied to Harlem, two and perhaps three candidates would appear on the primary ballot, providing voters in Harlem with the same opportunity for electoral choice that will be available to virtually all Republican voters elsewhere in the State. Given the obvious impact of the discriminatory ballot access requirement on the right to vote in Harlem, it is futile to claim that the discriminatory impact of the 5% ballot access standard does not "substantially" affect the right to vote. Whether one describes the impact on Republican voters in Harlem as "severe," "substantial" or "significant," a discriminatory ballot access rule that demonstrably prevents an election from taking place materially burdens voting rights and must be subjected to strict scrutiny.

Nor is the panel any more persuasive when it attempts to argue that the discriminatory 5% ballot access standard does not pose a "substantial" burden on the right to vote because, on occasion, more than one candidate has qualified for a primary in a 5% jurisdiction; and, on occasion, 1% jurisdictions have had only a single candidate. 26a-28a. Apparently, the panel believed that discriminatory ballot access laws are not to be subjected to strict scrutiny unless they absolutely disable a candidate from appearing on the ballot. It is, however, possible to satisfy even a discriminatory rule on occasion, just as it is possible to fail to satisfy a liberal ballot access rule on occasion. But the fact that it is possible, with extraordinary effort, to comply with a discriminatory ballot access law does not make the law constitutional. All concede that it is mathematically six times harder to place a Republican Presidential

candidate on the ballot in Harlem than in Nassau County. The fact that, on occasion, candidates and voters have been able to overcome discriminatory ballot access laws in urban Congressional Districts does not lessen the unfairness of imposing the discriminatory laws in the first place.

Finally, even the panel concedes that the discriminatory application of a 5% ballot access standard in urban Congressional Districts has made it virtually impossible for more than two candidates to appear on a Republican Presidential primary ballot, while the application of the 1% requirement in rural and suburban districts has often permitted three and even four candidates to appear on the Republican Presidential primary ballot. 28a-29a. Despite such a conceded discriminatory impact on the number of choices open to primary voters, the panel ruled that Chapter 586(2) did not cause a "substantial" dilution of the right to vote. 32a-33a. However, especially in a Presidential primary election designed to select a favored candidate from a number of alternatives, a rule that confines disfavored urban voters to, at best, a choice between two candidates, while permitting identically situated suburban voters to choose among three and four candidates, clearly discriminates against the urban voter. The panel's crabbed view of the right to vote overlooks the obvious fact that voting entails more than a formal ability to choose between two candidates. Rather, voting -- especially primary voting -- entails the capacity to choose a preferred candidate from among several. Where, as here, discriminatory ballot access rules provide some voters with a rich choice, and other voters with, at best, an impoverished choice, the quality of a primary vote is directly diminished.

When discriminatory ballot access rules imposed by statute:

> (1) cause the actual cancellation of a Presidential primary election that would have demonstrably taken place under non-discriminatory rules;
>
> (2) render it six times harder for voters in urban Congressional Districts to place a Presidential

> candidate on the primary ballot than for identically situated suburban voters; and
>
> (3) discriminatorily limit the choices available to urban voters to, at best, two Presidential candidates, while permitting suburban voters to choose among three and four candidates,

the discriminatory rules must be tested by strict scrutiny because they materially effect the quality of democratic participation. While it is, of course, true that not every burden on voting triggers strict scrutiny, this Court has never suggested that systemic discrimination allowing some voters to exercise a rich democratic choice, while condemning disfavored voters to no choice at all, can escape strict scrutiny.

Indeed, in the cases in which voting restrictions were subjected to lower levels of scrutiny, the impact on voting was both minor, and equally applicable to all. Thus, for example, in *Burdick v. Takushi*, 504 U.S. 428 (1992), a non-discriminatory ban on write-in voting did not trigger strict scrutiny because of the ease of securing ballot access in Hawaii. The Court stressed, however, that the application of a lower standard of review was conditioned on the existence of "non-discriminatory" election laws. *Burdick*, 504 U.S. at 434. *See Clements v. Fashing*, 457 U.S. 957 (1982). If, however, under *Burdick*, write-in voting were made available to some voters in an election, but denied to other voters in the same election, the discriminatory treatment would undoubtedly trigger strict scrutiny. *See American Party of Texas v. White*, 415 U.S.767 (1974)(invalidating placement of only major parties on absentee ballots); *O'Brien v. Skinner*, 414 U.S. 524 (1974); *Bullock v. Carter*, 405 U.S. 134 (1972).

In fact, discriminatory ballot access rules favoring rural and suburban voters at the expense of urban voters have uniformly been subjected to strict scrutiny. Thus, in *Moore v. Ogilvie*, 394 U.S. 814 (1969), the Court applied strict scrutiny to invalidate an Illinois ballot access statute because it "favor[ed] residents of some counties over residents of other counties." *Moore*, 394 U.S. at 817. In words that describe the New York

scheme at issue in this case, the Court invalidated a discriminatory ballot access scheme because it "applies a rigid, arbitrary formula to sparsely settled and populous counties alike, contrary to the constitutional theme of equality among citizens in the exercise of their political rights." *Moore*, 394 U.S. at 818-19.[12] Similarly, in *Illinois State Board of Election v. Socialist Workers Party*, 440 U.S. 173 (1979), the Court applied strict scrutiny to invalidate an Illinois ballot access scheme that required candidates seeking office in Chicago to obtain more signatures to get on the ballot than candidates for statewide office. The Court ruled that Illinois, having set a standard for statewide ballot access, must advance a compelling interest to explain why more stringent ballot access rules should apply in Chicago. The identical methodology requires invalidation of New York's scheme at issue in this case. Having established a baseline of approximately 1% of the electorate as the modicum of support required in the vast bulk of the state's Congressional Districts, New York must advance a compelling reason to justify the imposition of a discriminatory 5% test in six urban Congressional Districts.[13]

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[12] The discrimination in *Moore* gave rural voters a veto, while the discriminatory scheme at issue in this case merely gives rural and suburban voters a richer democratic choice than their urban counterparts. But the constitutional evil in both cases is identical -- the effort to treat some voters better than others.

[13] The panel opinion suggests that *Illinois State Board of Elections v. Socialist Workers Party*, *supra*, actually upholds differential ballot access rules because it appears to tolerate the same 25,000 signature requirement in Chicago and the entire State of Illinois, despite obvious differences in raw population. 33a, n.23. But the ballot access rules for Chicago and for statewide office at issue in *Socialist Workers Party* involved wholly separate elections for completely different offices. No effort was made in Illinois to subject voters *in the same election* to differential ballot access rules depending on where they happened to live. Moreover, the question of whether Illinois could demand a significantly higher percentage of the electorate to get on the ballot in Chicago than to get on the statewide ballot does not appear to have been raised or considered by the Court in *Socialist Workers Party*.

Finally, in *Norman v. Reed*, 502 U.S. 279 (1992), seven members of the Court, speaking through Justice Souter, utilized strict scrutiny analysis to invalidate an Illinois ballot access rule that required Cook County candidates wishing to run for offices in the City of Chicago to obtain support from suburban voters. Justice Scalia, writing in solitary dissent, argued that the restrictions in *Norman v. Reed* were rationally based.

Unfortunately, the panel's opinion simply ignored the Court's consistent command that differential ballot access rules be tested by strict scrutiny, choosing instead to apply the rational basis analysis put forth in Justice Scalia's dissent in *Norman v. Reed*. However, the majority in *Norman v. Reed* followed an unbroken line of precedents requiring strict scrutiny to measure discrimination in access to the ballot. Accordingly, the panel of the Second Circuit clearly erred in declining to require a showing of compelling need for the use of discriminatory ballot access rules in Chapter 586(2).[14]

B. The Panel's Effort to Categorize New York's Presidential Primary as Thirty-One Separate Elections Cannot Withstand Analysis

In an effort to minimize the discrimination inherent in applying a 5% ballot access rule in urban Congressional Districts and a 1% ballot access rule almost everywhere else, the panel argued that the New York State Republican Presidential primary election should be viewed as thirty-one simultaneous elections, with the voters in each Congressional District being treated equally. 29a-30a. It verges on the absurd, however, to treat a state-wide primary election designed to help select a single Presidential candidate as a simultaneous cluster of separate elections. Indeed, a similar argument was rejected in *Gray v. Sanders*, 372 U.S. 363 (1963). In *Gray*, the Court

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[14] Respondents have never even attempted to defend New York's plan under strict scrutiny, since it is impossible to articulate a "compelling" need for the discriminatory treatment of urban voters under Chapter 586(2).

invalidated Georgia's "county unit" primary system because it violated the principle of electoral equality. As here, defenders of the system argued in *Gray* that each county unit should be viewed as a separate election, with each participant treated equally at the county level. The Court correctly rejected the argument. In this case, on March 7, 1996, New York voters will be given an opportunity to participate in the nomination of a Presidential candidate by voting for pledged delegates to the Republican National Convention. The New York State Republican Presidential primary involves: (1) a single political issue -- the selection of a nominee; (2) the simultaneous election of candidates who are to serve in a common body; and (3) voters who share a common interest in the outcome of each delegate election because it affects their vote. To characterize such a unitary political event as thirty-one simultaneous separate elections for the purpose of measuring equal participation in the Presidential primary process is to ignore reality. The Equal Protection clause cannot so easily be avoided by the Balkanization of our electoral process.

II. New York's Discriminatory Ballot Access Rules Cannot Survive Rational Basis Scrutiny

Even if one measures New York's scheme under a rational basis standard, it cannot survive constitutional scrutiny. The panel suggested two so-called "rational" justifications for subjecting urban voters to 5% ballot access rules, while permitting almost everyone else to use a 1% test. First, the panel suggested that the differential treatment might be linked to a desire to compensate for population density disparities in rural and urban settings. 37a. Unfortunately, the panel ignored that it is Republican enrollment, not population density, that is the relevant variable in a primary open only to enrolled Republicans. As Judge Korman noted, Chapter 586(2) has it exactly backwards. In areas where Republicans are scarce, the statute makes it harder to get on the ballot. In areas where Republicans are numerous, the statute further relaxes the rules. 57a-58a.

Moreover, even if population density were a relevant variable, the panel failed to consider the extraordinary difficulty of canvassing for signatures in the inner-city. Random canvassing is useless because enrolled Republicans are so scarce. Targeted canvassing is extremely difficult during the day because the vast bulk of inner-city residents work. Targeted canvassing at night is even more difficult because concerns over personal security make it extremely difficult to gain access to apartment houses after dark. One looks in vain, however, for any effort on the part of the panel to apply genuine rational basis scrutiny. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). Instead, the panel simply used the phrase as a metaphor for judicial abdication.

Alternatively, the panel argued that differential ballot access rules are the rational *quid pro quo* for voting rules that favor Republicans living in low enrollment areas. 36a-37a. Since, argued the panel, all districts elect three delegates regardless of enrollment, voters in low enrollment areas have a greater mathematical voting power than voters in high enrollment areas. One inequality is said to cancel the other in a "two wrongs make a right" approach to constitutional law. But the panel's effort to right one constitutional wrong by invoking another fails at a basic level.

It is a false bargain to purport to provide urban voters with greater voting rights, while denying them a choice of who to vote for. Without equal ballot access rules, the panel's effort to build a justification based on enhanced voting power is cruel trap. Voting power presupposes electoral choice. But the panel has conceded that equal choice is denied to urban voters by the operation of Chapter 586(2). Of what use is a so-called enhanced vote to the Republican voters of Harlem who have been prevented from casting any ballot at all in the 1996 Republican Presidential primary by the discriminatory ballot access rules imposed by Chapter 586(2)?

Perhaps the most disturbing aspect of the panel's rational basis analysis is its concession that no single justification standing alone can provide a rational basis for the

discrimination visited on urban voters by Chapter 586(2). 37a. Instead, in what can only be called an exercise in legal alchemy, the panel argues that the individually inadequate justifications can be cumulated to satisfy a rational basis threshold. *Id.* Rationality is not, however, an exercise in addition. Cumulating inadequate justifications cannot be a basis for denying equal access to the ballot.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Second Circuit herein. Pending consideration of the petition, the Court should follow the practice followed by Justice Stevens in *Norman v. Reed*, 498 U.S. 931 (1990), and stay, or, if necessary, recall the mandate of the Second Circuit in order to permit the New York State Republican Presidential primary election to be governed by the provisions of the preliminary injunction issued by the United States District Court for the Eastern District of New York on December 13, 1995.

Dated: New York, New York
February 9, 1996

Respectfully submitted,

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APPENDIX

APPENDIX A

MANDATE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 21st day of December, one thousand nine hundred and ninety-five.

PRESENT: HON. DENNIS G. JACOBS
HON. GUIDO CALABRESI
HON. FRED I. PARKER,
Circuit Judges.

Docket No. (s): 95-9189, 95-9213, 95-9267

LARRY ROCKEFELLER; HOLANCE MORANCI; NEIL MORANCI; DONNA MORANCI; MARY PARRISH; LUGENIA GORDON; HELEN DALEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER; CORNELIUS P. DUGAN,

Plaintiffs-Appellees-Cross-Appellants,

STEVE FORBES, individually and as Candidate for President of the United States,

Plaintiff-Intervenor-Appellant,

v

WILLIAM D. POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE,

Defendants-Appellants-Cross-Appellees.

Appeal from the United States District Court for the Southern Eastern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ORDERED, ADJUDGED and DECREED that the preliminary injunctions of said district court be and they hereby are vacated with a formal opinion to follow. The mandate shall issue forthwith.

For the Court
GEORGE LANGE III, Clerk

By: /s/ Arthur M. Heller

Arthur M. Heller
Administrative Attorney

A TRUE COPY
GEORGE LANGE III, CLERK

/s/ George Lange III

ISSUED AS MANDATE. 12/21/95

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1283, 1443, 1444 — August Term 1995

(Argued: December 21, 1995 Decided: December 21, 1995
Opinion Issued: January 18, 1996)

Docket Nos. 95-9189, 95-9213, 95-9267

LARRY ROCKEFELLER; HOLANCE MORANCI; NEIL MORANCI; DONNA MORANCI; MARY PARRIS; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER; AND CORNELIUS P. DUGAN,

Plaintiffs-Appellees-Cross-Appellants,

STEVE FORBES,

Plaintiff-Intervenor-Appellant,

– v. –

WILLIAM D. POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE,

Defendants-Appellants-Cross-Appellees.

Before:

JACOBS, CALABRESI, and PARKER,

Circuit Judges.

Appeal from a preliminary injunction issued by the United States District Court for the Eastern District of New York, (Edward R. Korman, J). The injunction struck down as a violation of the Equal Protection Clause New York's signature petition requirement for delegate candidates in the Republican Party presidential primary, and instituted a new signature requirement. The injunction is vacated and the state signature requirement is restored.

RICHARD D. EMERY, New York, NY; BURT NEUBORNE, The Democracy Project, The Brennan Center for Justice, New York University School of Law, New York, NY (Andrew G. Celli, Jr., Richard D. Emery, P.C., New York, NY, on the brief) *for Plaintiffs-Appellees-Cross-Appellants.*

THOMAS J. SPARGO, East Berne, NY, *for Plaintiff-Intervenor-Appellant.*

JAN WITOLD BARAN, Washington, DC (Carol A. Laham, Thomas W. Kirby, Michael E. Toner, Wiley, Rein & Fielding, Washington, DC, on the brief) *for Defendants-Appellants-Cross-Appellees.*

(Dennis C. Vacco, Attorney General of the State of New York, and Assistant Attorneys General Joel Graber and Kevin C. Reilly, New York, NY, of counsel, filed a brief for *Amicus Curiae Attorney General of the State of New York*).

JACOBS, *Circuit Judge*:

The New York Republican State Committee will hold a primary on March 7, 1996 in which it will select its delegates to the 1996 Republican National Convention. The rules of the National Republican Party mandate that three convention delegates are to be elected in each congressional district. To be eligible for the ballot under New York law, delegate candidates need to collect signatures from the lesser of five percent or 1250 of the enrolled Republicans in the delegates' congressional district. The United States District Court for the Eastern District of New York (Korman, J.) issued an injunction on December 1, 1995, striking down the "five percent or 1250" rule as a violation of the Fourteenth Amendment's Equal Protection Clause and instituting in its place a "1.41 percent or 1250" rule. *See Rockefeller v. Powers*, ___ F.Supp. ___, No. CV 4478, 1995 WL 744927 (E.D.N.Y. Dec. 13, 1995).[1] The question presented is whether the injunction should be upheld.

The Republican State Committee moved for an expedited appeal, so that delegate candidates who were in the process of collecting signatures for nominating petitions due on January 4, 1996, would know what the signature requirement was. On December 5, 1995, we granted the motion to expedite the appeal. On December 21, 1995, after oral argument, we vacated the injunction and announced that an opinion would follow.

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[1] On November 22, 1995, the district court held a hearing on the plaintiffs' preliminary injunction motion. On November 27, the court announced that it would issue an injunction and delivered an oral opinion from the bench explaining its reasons. On December 1, the injunction issued. On December 13, after we had granted the defendants' motion for an expedited appeal and had received the first set of briefs, the district court filed a thorough written opinion explicating the reasons it had given from the bench on November 27.

I

The plaintiffs are enrolled New York Republicans, residing in the Tenth, Eleventh, Twelfth, and Fourteenth congressional districts.[2] On November 13, 1995, they sued the New York State Board of Elections, the New York City Board of Elections, four county boards of elections, the New York Republican State Committee, the commissioners of all these bodies, and the Republican National Committee. The plaintiffs alleged in their complaint that the ballot access rules for the 1996 New York Republican presidential primary election—requiring petitions signed by the lesser of five percent or 1250 registered Republicans in each congressional district—violate their equal protection and First Amendment rights.[3] A clear understanding of those rules and their source is essential for a proper resolution of this case.

In presidential election years, the National Republican Party holds a convention at which it chooses its nominees for President and Vice-President, adopts a platform expressing Party policy positions, and takes care of internal Party affairs. Among other things, the delegates adopt the rules that govern delegate selection for the next convention. The rules adopted at the 1992 Convention provide that each state may send to the 1996 Convention six at-large delegates, several "victory bonus" delegates (assigned to states that voted Repub-

[2] There are also plaintiffs from the First, Third, Fourth, Twenty-Eighth, and Twenty-Ninth congressional districts, but they are unaffected by the injunction's reduction of the percentage signature requirement from five percent to 1.41 percent. They join the argument on cross-appeal that the percentage signature requirement should be lowered still further, to 0.79 percent, a reduction that would affect all of them but the plaintiff from the Third District (where the effective percentage is already 0.79 percent).

[3] The district court did not address the First Amendment claim. *Rockefeller*, 1995 WL 744927 at *3. It is therefore not before us on appeal.

lican in the 1992 presidential election or that have prominent or numerous Republican officeholders), and three delegates "for each Representative" in the House of Representatives. *Rules of the Republican Party* (1992), Rule 31(a)(2). These last delegates "shall be elected by each [ ] Congressional district." *Id.* Rule 32(b)(5). All delegates "shall be elected . . . [i]n accordance with any applicable laws of a state, insofar as the same are not inconsistent with these rules." *Id.* Rule 32(a)(1).

On August 8, 1995, the New York Legislature adopted Sessions Law 586 to govern the selection of delegates to national political party conventions in 1996. 1995 N.Y. Laws 586. Political parties must conduct their delegate selection processes under either section 2 or section 3 of the law. *Id.* § 1.

Section 3, the path traditionally associated with the Democratic Party, we are told, gives three choices: one, the party can select its delegates by holding a statewide presidential primary "in which the names of candidates [for President] appear on the ballot," *id.* § 3(1)(a); two, it can hold direct elections for delegates in each congressional district, *id.* § 3(1)(b); three, it can decide on the party's nominee by an internal party meeting or convention. *Id.* § 3(1)(c). If it chooses to elect delegates directly by congressional districts, delegate candidates must file petitions signed by the least of (i) 1,000 of the enrolled party voters in their district, (ii) 0.5 percent of such voters, or (iii) a number of such voters equal to 0.5 percent of all votes cast in the district in the 1992 New York Democratic presidential primary. *Id.* § 3(6)(c). None of the provisions of section 3 is challenged here.

Section 2, we are told, is the provision traditionally associated with the Republican Party, and it was in fact the one chosen by the Republican State Committee for its 1996 primary. Section 2, once chosen by the political party, requires that delegates be selected in direct elections conducted in each congressional district. *Id.* § 2(2)(a). When filing their candidacies under section 2, delegates either declare their alignment with a particular presidential candidate or declare themselves "uncommitted." *Id.* § 2(4)(a). Their allegiance to a presidential candidate or their uncommitted status is shown on the ballot next to their names. *Id.* § 2(4)(c). The business end of section 2 states: "Except as provided in this section and party rules and regulations, the provisions of the election law shall apply to elections conducted pursuant to this section." *Id.* § 2(6).

Neither section 2 of Sessions Law 586 nor the Republican Party rules and regulations say anything about the signature requirements for placing delegate slates on the ballot. Therefore, "the provisions of the [New York State] election law" dealing with signature requirements apply to the 1996 Republican Party primary.[4] Specifically, section 6-136 of New York Election Law provides that candidates "[f]or any office to be filled by all the voters of any congressional district" need to file petitions with signatures from five percent or 1250 of enrolled party voters from the district, whichever is less. N.Y. Elec. Law § 6-136(2)(g) (McKinney 1995). This numerical requirement is applied to party convention delegates, on a permissive basis, by section 6-136(3), which states that "[t]he number of signatures on a peti-

[4] While section 2 thus incorporates wholesale the New York State election law provisions, section 3 picks and chooses between the election law provisions it incorporates, and omits § 6-136. *See* 1995 N.Y. Laws 586, § 3(6)(a).

tion . . . to designate a candidate for the position of district delegate to a national party convention need not exceed the number required for a petition for representative in congress." *Id.* § 6-136(3). Thus, for the 1996 Republican primary, the "five percent or 1250" signature rule applies.[5]

The gravamen of the plaintiffs' claim as it reaches us on appeal is that this signature requirement—the lesser of a fixed number or a fixed percentage in each congressional district—violates the Equal Protection Clause by discriminating against voters from congressional districts having relatively few enrolled Republicans. The plaintiffs explain this by statistics. New York has thirty-one congressional districts. Republicans are most numerous in the Third District in suburban Long Island: 158,097 Republicans are registered there. Since five percent of this number, 7905, exceeds 1250, the five percent threshold does not apply. Thus, Republican delegate candidates in the Third District need 1250 signatures to qualify for the ballot, a mere 0.79 percent of the district's enrolled Republicans. In contrast, Republicans are least numerous in the Eleventh District in Brooklyn, where only 11,814 Republicans are registered. Since five percent of this number, 591, is fewer than 1250, Republican delegate candidates in the Eleventh District need only 591 signatures to qualify for the ballot.

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[5] Both parties seem to proceed on the assumption that the signature rule in fact applies to an entire "slate" of three delegate candidates, representing the same presidential candidate, and that *each* delegate candidate need not gather five percent or 1250 signatures. Neither party explains how the statutory terms can be interpreted this way. *See* 1995 N.Y. Laws 586, § 2(4)(a); N.Y. Elect. Law § 6-136(3); *see also* 1995 N.Y. Laws 586, § 2(4)(f). We accept for this case the parties' statement that the signature requirement applies to a "slate" of delegate candidates, without concluding that the laws must be read in this way.

The plaintiffs thus demonstrate that a smaller percentage of Republicans in the Third (as compared to the Eleventh) congressional district can secure a spot on the ballot for a slate of candidates, and characterize this as a disparity of constitutional dimension. The indisputable arithmetic is that in districts like the Eleventh, having fewer than 25,000 enrolled Republicans, delegate candidates need the signatures of five percent of enrolled Republicans to get on the ballot, while in heavily Republican districts like the Third, delegate candidates need the signatures of (variously) only 0.81 percent (the Twenty-Second), 0.97 percent (the First) or 1.10 percent (the Nineteenth) of enrolled Republicans. Of the thirty-one districts, seven have an effective signature requirement for the 1996 primary of one percent or less, and sixteen (a majority) have a signature requirement of 1.41 percent or less.[6]

---

[6] The statistics regarding all thirty-one districts are as follows:

District	*Registered Republicans*	*% Republicans Needed on Petition*	*Rank*
3	158,097	0.79	1
22	153,824	0.81	2
27	148,319	0.84	3
4	148,013	0.84	4
23	143,555	0.87	5
31	137,952	0.91	6
24	136,788	0.91	7
1	129,111	0.97	8
25	124,260	1.01	9
26	116,360	1.07	10
19	114,008	1.10	11
29	113,561	1.10	12
28	112,797	1.11	13
2	112,442	1.11	14
20	102,232	1.22	15
13	88,350	1.41	16
21	86,470	1.45	17
5	85,213	1.47	18

(footnote continued)

The result, say the plaintiffs, is less choice for Republican voters in districts like the Eleventh. As proof, they point to the last contested Republican presidential primary in New York, in 1988. The four principal contenders were George Bush, Robert Dole, Jack Kemp, and Pat Robertson. After analyzing the delegate slates in all congressional districts, the plaintiffs report that in the eight districts with the fewest registered Republicans, four had only Bush delegates on the ballot, three had Bush and Kemp delegates on the ballot, and one had Bush and Dole delegates. In contrast, in ten of the districts "with greater numbers" of enrolled Republicans, two districts had delegates representing all four candidates, and the other eight had delegates representing George Bush and two others.

According to the plaintiffs, the reason for this disparity in ballot choice is the disparity of burdens created by the split-level signature requirement. The plaintiffs claim that in the heavily-Republican rural or suburban districts, where gathering signatures is as easy as "stand[ing] in the mall or at the town grocer's and solicit[ing] signatures from everyone who walks by," the

District	*Registered Republicans*	*% Republicans Needed on Petition*	*Rank*
18	85,062	1.47	19
30	80,970	1.54	20
14	52,555	2.38	21
9	52,511	2.38	22
7	46,303	2.70	23
8	33,247	3.76	24
6	25,457	4.72	25
17	23,090	5.00	26
12	21,215	5.00	27
10	17,114	5.00	28
15	15,561	5.00	29
16	14,852	5.00	30
11	11,814	5.00	31

1250 signature requirement softens an already easy job by reducing the required percentage of signatures well below five percent. On the other hand, the plaintiffs claim that in the largely urban districts with relatively few Republicans, where "a petition-carrier could wait for a week on Flatbush Avenue and not encounter a single Brooklyn Republican!", the onerous five percent requirement is unmitigated.

As one can see from the 1988 data (set forth in the margin[7]), however, there are additional observations that

[7]

District	*Registered Republicans*	*Rank*	*Candidates on Ballot**
24	128,556	1	B
5	126,845	2	B K R
4	125,413	3	B K R
26	123,159	4	B
31	119,900	5	B K R
34	118,986	6	N
30	115,925	7	B D R
29	114,293	8	N
25	113,897	9	B D K R
3	113,442	10	B
1	112,773	11	B D K R
28	106,686	12	N
27	105,173	13	B K R
2	103,559	14	B D
21	97,946	15	B D K
32	97,628	16	B K R
23	87,132	17	B
20	86,761	18	B
22	83,864	19	B K R
14	52,288	20	B K
33	52,182	21	B K
19	41,923	22	B
15	38,339	23	B D
9	38,297	24	B K
8	35,923	25	B
7	30,803	26	B D
10	25,489	27	B
17	22,624	28	B K
13	22,005	29	B K

(footnoted continued)

may be made from the same data upon which the plaintiffs rely. First, the ten districts "with greater numbers," cited by the plaintiffs for the proposition that heavily Republican districts have more ballot choices, were selectively chosen. Those ten districts range from the second most Republican district to the nineteenth: the more significant observation concerning these nineteen districts is that, while roughly half had three or more candidates (as the plaintiffs point out), almost half had either no delegates or only Bush delegates on their ballots. Second, if the districts are divided between the seventeen most Republican districts and the seventeen least Republican districts, exactly seven districts in each group had either no delegates or only Bush delegates on the ballots. Third, Kemp delegates do not seem to have been disadvantaged by the signature requirement: they appeared on ballots in eight of the top seventeen and seven of the bottom seventeen Republican districts. Finally, the only three districts in which no candidate qualified for the ballot were heavily Republican (the Twenty-Eighth, Twenty-Ninth, and Thirty-Fourth).[8]

Nevertheless, the district court agreed with the plaintiffs that the signature requirement created disparate lev-

District	*Registered Republicans*	*Rank*	*Candidates on Ballot**
6	21,737	30	B D
16	11,288	31	B
11	9,685	32	B
18	8,702	33	B
12	6,638	34	B K

* B=Bush, D=Dole, K=Kemp, R=Robertson, N=None.

[8] At oral argument, the plaintiffs' counsel speculated that the absence of delegate candidates on the ballots in those districts was caused by various technical requirements that eliminated enough signatures so as to disqualify all the petitions filed.

els of choice among districts, and that this disparity violated the Equal Protection Clause. The five percent or 1250 signature requirement "prevent[ed] 'independent' candidates from obtaining the requisite number of signatures," said the court, and harmed "particular voters whose right to vote in a particular election is rendered meaningless."[9] *Rockefeller v. Powers*, ___ F.Supp. ___, ___, No. CV 4478, 1995 WL 744927, *6 (E.D.N.Y. Dec. 13, 1995). Applying the strict scrutiny test from *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979), the court held that no compelling interest existed for the five percent or 1250 signature requirement. In fact, wrote the court, "[t]he only justification appears to be a desire to increase the advantage already enjoyed by the presidential candidate favored by the Party organization," *Rockefeller*, 1995 WL 744927 at *5, with the result that the Republican primary has now become "little more than a state-sponsored endorsement of the candidate of the party leadership." *Id.* at *6. The court found that the only "legitimate objective" advanced by the five percent or 1250 signature requirement is the assurance that delegate candidates have "a minimum modicum of support," but that this objective "could be achieved in a far more rational and less restrictive way."[10] *Id.* at *7.

The district court thought that it had found such a way and embodied it in the injunction, explaining as follows. The "minimum modicum of support" rationale makes sense

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[9] The district court's opinion does not examine the plaintiffs' data closely. The court bases the injunction on the assumption that the data means what the plaintiffs claim it means. *See Rockefeller*, 1995 WL 744927 at *5.

[10] The district court employed the strict scrutiny test to strike down the signature requirement scheme, but also concluded that the scheme was unconstitutional "[u]nder any test—strict scrutiny, balancing of interests, or rational basis." *Rockefeller*, 1995 WL 744927 at *7.

only if "the 1250 cap . . . that liberalizes ballot access" was "an exception" to the five percent rule. *Id.* at *9. Under the framework established by New York's Legislature, however, twenty-five of the thirty-one districts "benefit" from the 1250 cap while only six districts have to meet the five percent requirement. The 1250 cap is therefore the "rule", reasoned the court, and the extra "burden" created by the five percent rule is the "exception." Since the district court viewed the 1250 cap as having a liberalizing or ameliorative influence on the burden imposed by the five percent rule, the signature requirement scheme could be deemed "least restrictive" only if the 1250 voter cap becomes the exception to the percentage rule. The proper fix, according to the district court, was to replace five percent with 1.41 percent, because in the majority of the districts, delegate candidates were required to collect signatures from 1.41 percent or more of the district's registered Republicans. *See* note , *supra*. In this way, the 1250 cap would be returned to its proper status as "an exception that liberalizes ballot access," *id.* at *9, since it would now apply in a minority of the districts, and the 1.41 percent requirement would now be the "rule," applying to sixteen of the thirty-one districts. *See generally id.* at *1-2, 9. The district court issued an injunction effectively requiring that the defendants enforce the signature requirement as if it were a "1.41 percent or 1250 rule."[11]

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[11] The injunction as originally issued affected only the Tenth, Eleventh, Twelfth, and Fourteenth congressional districts, since only these districts were represented by plaintiffs in this lawsuit. On December 13, presidential candidate Steve Forbes's motion to intervene as a plaintiff was granted. An attorney for the Forbes for President Committee alleged that Forbes delegates could definitely meet the 1.41 percent signature requirement, but that "there is a substantial likelihood" that they could not meet the five percent requirement in those districts where it would apply. After Forbes intervened, the district court issued a new order extending the 1.41 percent ruling to all fifteen congressional districts that had an effective signature requirement of greater than 1.41 percent.

The New York State Republican Committee and its chairman appealed. They argued that this case is nonjusticiable, that the plaintiffs lack standing, that the rational basis test applies to the disparate treatment created by the signature requirement, and that a rational basis for it exists. The plaintiffs cross-appealed, arguing that "the logic of the remedy granted by the district court requires that the modicum of support requirement be fixed at 0.79 percent, or at most 1.07 percent, rather than 1.41 percent."

On December 21, 1995, we reversed and restored the five percent or 1250 signature requirement. This opinion explains why.

II

The defendants argue that this case is nonjusticiable because the plaintiffs are inviting us to meddle in the internal affairs of a political party. However, the statutory signature requirement scheme at issue is not an internal party rule, and is easily classified as state action. The defendants' justiciability arguments therefore fail.

Under the National Republican Party rules, most of the delegates to the national convention are selected by registered Republicans in each of the nation's 435 congressional districts. The plaintiffs do not challenge this implicit determination by the Republican Party that a geographically diverse delegate group improves its choice of presidential and vice-presidential candidates. Rather, they challenge the State's signature requirement process, embodied in Sessions Law 586 and New York Election Law § 6-136. The rules adopted by the National

Republican Party and by the Republican State Committee have no five percent minimum, no 1250 cap, and in fact no signature requirement at all. The requirement, as applied to the 1996 primary, is purely a product of two state laws. We conclude that the signature requirement scheme challenged by the plaintiffs constitutes state action that courts may examine to ensure that it does not violate the Equal Protection Clause.

True, the State offered the Republican State Committee a choice of schemes, and the particular scheme at issue is being employed because it was chosen by the Committee. Although the Republican State Committee is therefore the but-for cause of the supposed disparity, the Committee's selection of one of two state-offered options does not abrogate the state action. Pursuant to Sessions Law 586, the State has determined that the five percent or 1250 signature requirement is an appropriate way to make sure that only delegate candidates with a modicum of support make it on the ballot. The fact that the State Republican Committee agrees with the State that this is an appropriate ballot access rule does not change our analysis. We do not consider the justiciability of a challenge to the State Republican Committee's *choice* of the option embodied in section 2. The challenge here is to state laws that create (although they do not necessarily impose) the five percent or 1250 signature requirement.

In *Bullock v. Carter*, 405 U.S. 134 (1972)—the Supreme Court ballot access case most similar to ours in many respects—the Court struck down a Texas law requiring that candidates in primary elections pay a filing fee to get on the ballot. The law, however, set no fee amounts, leaving it completely up to the judgment of the state's political parties what fee to charge (so long as it

was, "in their judgment [ ] just and equitable"). *Id.* at 138. Each political party imposed its own fees (and different fees for different offices in different counties) with the result that ballot-access fees varied from $50 to $6,300. The Court found state action, even though the filing fee requirement applied only to primaries and the political parties were free to fix whatever fees they wished. *Id.* at 140 ("the mechanism . . . is the creature of state legislative choice and hence is `state action' within the meaning of the Fourteenth Amendment"). If it is state action for a legislature to adopt a ballot access rule so permissive and indulgent as the one struck down in *Bullock*, it is state action *a fortiori* for the New York Legislature to adopt a ballot-access rule that (at least on its face) narrows to two the ballot-access choices available to each party.

In reaching our conclusion that this is state action, we are also guided by our prior decision in *Montano v. Lefkowitz*, 575 F.2d 378 (2d Cir. 1978) (Friendly, J.). A Bronx congressman retired in mid-term. New York law allowed each political party to nominate a replacement candidate "in such manner as the party rules prescribed." *Id.* at 380. Although the congressional district covered less than all of the Bronx, the State Democratic Party delegated this task to the Executive Committee of the Bronx County Democratic Party. The Executive Committee included party members from throughout Bronx County, some of whom represented districts other than the newly vacated one. Democratic voters in the vacated district sued, claiming that their equal protection rights were violated by allowing party members from outside their district to participate in an intra-district nomination. *Id.*

Even though the State had not enacted or specified the nominating process, we held that "New York's delegation to the various parties of the right to nominate candidates for special elections renders the party selection process state action." *Id.* at 383 (citations omitted); *see also id.* at 383 n. 7 ("[W]e join with most commentators and many lower courts in holding that when the state grants political parties the right to nominate candidates and then gives those nominees special access to the ballot, the parties' procedures constitute state action." (internal quotations and citations omitted)).

The argument for state action is stronger here than in *Montano*. Here, the State itself created the scheme at issue. Faced with an allegedly unconstitutional act of the State, we inspect it. *See Gray v. Sanders*, 372 U.S. 368, 374 (1963) (political party's actions in conducting state-regulated primary constitute state action); *Mrazek v. Suffolk County Bd. of Elections*, 630 F.2d 890, 894 (2d Cir. 1980).[12]

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[12] In arguing that this case is non-justiciable, the defendants cite to several cases, all of which are distinguishable. In *Democratic Party v. Wisconsin*, 450 U.S. 107 (1981), the Supreme Court struck down a state's effort to force the National Democratic Party to seat its state delegation even though it had been selected contrary to Democratic Party procedures. The Court stated that:

> [I]t is not for the courts to mediate the merits of this dispute. For even if the State were correct, a State, or a court, may not constitutionally substitute its own judgment for that of the Party. A political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution. And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.

Id. at 123-24 (footnotes omitted). Similar pronouncements are made in *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 229-31 (1989), and *Tashjian v. Republican Party*, 479 U.S. 208, 224 (1986). We do not, however, think that they apply to this case, which

III

The defendants argue that the plaintiffs lack standing. To establish a case or controversy under Article III, "[1] the plaintiff must have suffered an injury in fact . . . , [2] there must be a causal connection between the injury and the conduct complained of . . . , [and 3] it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations and citations omitted). The defendants point out that, although the plaintiffs claim standing by virtue of their alleged lack of choice in the Republican presidential primary, there is no guarantee that a change in the ballot access rule would widen their choices, particularly since the plaintiffs cannot identify candidates who have already been or definitely will be excluded by the signature requirement. Accordingly, say the defendants, there is no "injury in fact" that can be "redressed by a favorable decision."

This argument is insupportable in light of *Northeastern Florida Chapter of Associated General Contractors*

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does not concern a state's effort to tell a party how to conduct its affairs. Nor does this case require us to decide whether a political party's decision is "unwise or irrational." Rather, the question presented is whether a signature requirement created by state law is constitutional. Supreme Court precedent forecloses the argument that courts may never examine political party actions challenged as unconstitutional. *See, e.g., Gray*, 372 U.S. 368 (1963); *Smith v. Allwright*, 321 U.S. 649 (1944). Certainly none of the cases cited by the defendants stands for the proposition that state action that implicates a political party somehow becomes immune from judicial review because of a party's First Amendment associational rights.

Also distinguishable are *O'Brien v. Brown*, 409 U.S. 1, 3 (1972); *Ripon Soc'y, Inc. v. Nat'l Republican Party*, 525 F.2d 567, 576 (D.C. Cir. 1975) (in banc), *cert. denied*, 424 U.S. 933 (1976); and *Bachur v. Democratic Nat'l Party*, 836 F.2d 837, 842-43 (4th Cir. 1987), which involved challenges to national party rules.

v. City of Jacksonville, 113 S. Ct. 2297 (1993), an equal protection case concerning a minority set-aside program for government contracts. There, the Court explained that contractors challenging the rule need not show that, but for the set-aside rule, they definitely would have received a contract. Rather, they merely had to establish that their ability to compete was impaired. Stated more generally, "[t]he 'injury in fact' in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit." *Id.* at 2303. The plaintiffs have stated this kind of "injury in fact."

The plaintiffs claim that the five percent or 1250 formula operates to restrict their choice in Republican presidential primaries. If their statistical arguments are credited, voters living in districts with relatively few Republicans would likely have a more narrow choice of delegates pledged to the various presidential candidates. Under *Northeastern Florida*, they need not establish that, absent the current rule, they *necessarily* would see more candidates on their ballot. Their claim that the rule decreases the likelihood that they will have choices among delegates amounts to a sufficient pleading of "injury in fact" and a "causal connection."[13]

The redressability requirement is also satisfied, although not perhaps by the redress the plaintiffs would prefer. The district court imposed a 1.41 percent requirement for half the districts, and plaintiffs seek an across-the-board 0.79 percent requirement. We have some

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[13] The defendants cite to our *per curiam* opinion in *Clark v. Rose*, 531 F.2d 56 (2d Cir. 1976), a case decided before *Northeastern Florida*. There, the plaintiff, a candidate, did not try to comply with a signature requirement and did not allege that it unfairly burdened him relative to another group. *Id.* at 58. The case is therefore not on point.

reservations about each of those remedies, since we suspect that the selection of a particular percentage requirement is legislative rather than judicial activity. However, a court redressing the plaintiffs' claim could certainly strike down the 1250 signature alternative, leaving a five percent requirement across-the-board (which no one seems to want); or it could strike down section 2 of Sessions Law 586 in its entirety, leaving the Republican Party with the other option in the statute—the one apparently associated with the Democratic Party. We conclude therefore that the plaintiffs' claim, if it exists, could be redressed.

Finally, we reject the defendants' argument that, because "the best party" to bring this claim is a delegate candidate, not non-candidate voters, the plaintiffs lack "prudential standing." Voters have standing to bring claims alleging that their district was unconstitutionally drawn because they suffer "special harms" from this constitutional violation. *United States v. Hays*, 115 S. Ct. 2431, 2436 (1995). The plaintiffs allege here that the state action decreases their voting choices relative to voters in other districts. This harm is particular to them and would not be felt in those terms by the delegate candidates who abandoned the race or failed to collect enough signatures. As said in *Bullock*, "the rights of voters and the rights of candidates do not lend themselves to neat separation." 405 U.S. at 143. We therefore conclude that the plaintiffs have standing to bring this suit.

IV

To obtain a preliminary injunction in this Circuit,

> the moving party must show (1) the likelihood of irreparable injury, and (2) either (a) likelihood of

> success on the merits, or (b) sufficiently serious questions going to the merits and a balance of hardships tipping decidedly in the movant's favor.

Tough Traveler, Ltd. v. Outbound Prods., 60 F.3d 964, 967 (2d Cir. 1995). Assuming irreparable injury, the district court premised the injunction on the basis of "likelihood of success on the merits." *Rockefeller*, 1995 WL 744927 at *9-10. Our analysis leads us to the conclusion that the plaintiffs have not shown that they are likely to succeed on the merits.

The district court held that the State's five percent or 1250 rule does not withstand strict scrutiny. It chose the strict scrutiny test by applying *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). There, the Court struck down Illinois's requirement that independent candidates and "new political parties" collect 37,000 signatures to secure a place on the ballot in Chicago general elections, but only 25,000 to get on the ballot in statewide general elections, despite the fact that the voting population of Chicago was one-sixth as large as the statewide voting population.[14] *Id.* at 175-77, 183-

[14] The statute required an absolute number of signatures (25,000) for statewide elections, but for elections in a political subdivision of the state (like Chicago), it required signatures from five percent of the number of voters in the previous election. 440 U.S. at 175-76 nn. 1-2. In Chicago, the five percent requirement equaled 35,947 signatures. *Id.* at 177. The Court held this disparity unconstitutional "insofar as it requires . . . more than 25,000 signatures in Chicago," *id.* at 187, implicitly allowing the signature requirement for both Chicago and Illinois to be set at 25,000. Thus, a 3.5 percent requirement (25,000) in Chicago and a 0.5 percent requirement (25,000) in Illinois passed muster in *Socialist Workers Party*, notwithstanding a seven-fold disparity.

After that case, Illinois did in fact set a 25,000 signature requirement for general elections, both statewide and within political subdivisions. *See Norman v. Reed*, 502 U.S. 279, 292 (1992). Recently, the Court again implied that Illinois's across-the-board 25,000 signature requirement was proper, even as applied to political units with different populations. *Id.* at 295.

84. The Court explained its decision to apply strict scrutiny as follows:

> Restrictions on access to the ballot burden two distinct and fundamental rights, "the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion, to cast their votes effectively." *Williams v. Rhodes*, [393 U.S. 23, 30 (1968)]. . . . By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences. . . .
>
> When such vital individual rights are at stake, a State must establish that its classification is necessary to serve a compelling interest.

Id. at 184.[15] We believe that the district court was incorrect to conclude, as it apparently did, that the broad language of *Socialist Workers Party* automatically requires strict scrutiny for ballot-access measures that result in any sort of disparate treatment.[16] But we need not decide

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[15] Although the Court applied the strict scrutiny test, it would appear that the law would not have survived a rational basis test either. 440 U.S. at 186 (the state "has advanced no reason, much less a compelling one, why [it] needs a more stringent requirement for Chicago"). A similar problem undercuts the plaintiffs' attempt to derive support for the application of strict scrutiny from *Gjersten v. Board of Election Comm'rs*, 791 F.2d 472, 473 (7th Cir. 1986). There, the Seventh Circuit struck down a ten percent signature requirement for ward committeemen, because township committeemen were only subject to a five percent requirement. The court did not explain what level of scrutiny it was applying, simply concluding that there was *no reason* for the extra restriction. *Id.* at 477 ("the defendants presented no justification for the ten-percent requirement").

[16] In due process cases after *Socialist Workers Party* and in equal protection cases before it, the Supreme Court has consistently held that, even though "[e]lection laws will invariably impose some burden upon individual voters," *Burdick v. Takushi*, 504 U.S. 428, 433 (1992), not all restrictions on access to the ballot merit strict scrutiny. *See, e.g., id.* at

here the exact scope of *Socialist Workers Party*, because the plaintiffs have not shown that the disparity in sig-

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432 ("Petitioner proceeds from the erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny. Our cases do not so hold."); *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) ("Although these rights of voters are fundamental, not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally suspect burdens on voters' rights to associate or to choose among candidates."); *Bullock*, 405 U.S. at 143 ("Of course, not every limitation or incidental burden on the exercise of voting rights is subject to a stringent standard of review.").

Rather, as the Court made clear in *Norman v. Reed*, 502 U.S. 279 (1992), *Socialist Workers Party* merely stands for the proposition that "any *severe* restriction [on the right to create and develop new political parties must] be narrowly drawn to advance a state interest of compelling importance. *See Socialist Workers Party*." *Id.* at 289 (emphasis added). In *Burdick*, the Court took the *Norman* Court's statement that a restriction must be "severe" to merit strict scrutiny, and extended it to all claims that the fundamental right to vote has been burdened. 504 U.S. at 434; *see also Schulz v. Williams*, 44 F.3d 48, 56, 58 (2d Cir. 1994) (only "severe" restrictions on right to vote are subject to strict scrutiny; "slight" restrictions get rational basis review).

The critical question, as the Court made clear prior to *Socialist Workers Party* and has reiterated forcefully since, is "the extent to which a challenged regulation burdens First and Fourteenth Amendment [voting] rights." *Burdick*, 504 U.S. at 434; *see Anderson*, 460 U.S. at 786 ("[I]n approaching candidate restrictions, it is essential to examine in a realistic light the extent and nature of their impact on voters." (quoting *Bullock*, 405 U.S. at 143)); *see also Unity Party v. Wallace*, 707 F.2d 59, 61 (2d Cir. 1983) ("We must [ ] examine the nature, extent and likely effect of the law on the interests of those claiming to be fenced out by it.").

As applied to the equal protection context, this would mean that, if ballot access rules affected two groups of people differently, such that different "appreciable" (or "significant," "substantial," or "severe") burdens were imposed on the fundamental right to vote of the two groups, then strict scrutiny would apply. We need not decide today whether the disparity between the burdens would need to be "severe," to borrow from the Supreme Court's "Due Process/First Amendment" cases, *see Burdick*, 504 U.S. at 434, or merely "substantial"—as it has suggested in cases analyzed explicitly under the Equal Protection Clause, *see Storer v. Brown*, 415 U.S. 724, 729 (1974) ("substantial burdens on the right to vote . . . are constitutionally suspect and invalid . . . under the Equal Protection Clause unless essential to serve a compelling state interest.");

nature percentages significantly burdens their fundamental right to vote or significantly impairs their ability to express political preferences. Thus, even considering *Socialist Workers Party* as the controlling legal framework, we still conclude that strict scrutiny is not required.[17]

The injury claimed by the plaintiffs is that on March 7, 1996, they and other voters in districts with few Republicans will likely have fewer delegate slates from

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Bullock, 405 U.S. at 144 (strict scrutiny applied where voters are "substantially limited in their choice of candidates"); *see also Greidinger v. Davis*, 988 F.2d 1344, 1352 (4th Cir. 1993) (interpreting Supreme Court ballot access cases to mean that equal protection claims are subjected to strict scrutiny if the state "imposes a substantial burden on the associational rights or voting rights at stake")—or just "significant." Because we hold today that *the disparities* created by the five percent or 1250 rule do not even "significantly" burden the plaintiffs' fundamental right to vote, we do not decide what other or greater level of burden may be required.

[17] The only claim before us on appeal is whether the ballot access restrictions violate the plaintiffs' rights under the Equal Protection Clause. Although the plaintiffs did not make the claim directly that New York's ballot access rules impose an undue burden on their voting rights, the suggestion that the percentage requirement in certain districts is unreasonably high does surface occasionally in the briefs, and was certainly made at oral argument. The plaintiffs also contended (primarily at oral argument) that the burden was higher than the five percent or 1250 requirement might suggest, because technical challenges to a candidate's signatures are invariably mounted by the Republican Party, effectively requiring candidates to collect three times the number of signatures necessary to get on the ballot. Such an argument is premised on First Amendment or due process rights, not equal protection rights, because these technical requirements apply uniformly throughout the state and thus raise questions about the severity of the burden generally. While the technical requirements may make it three times more difficult to get on the ballot in a small district, it is also three times more difficult in a large district. This challenge is not on appeal because the preliminary injunction was based solely on the equal protection claim. In addition, because we have not been presented with a due process claim, we cannot know whether the burden imposed by these rules rises to the level of a constitutional violation.

which to choose, as compared with their fellow Republicans who live in heavily Republican districts. The plaintiffs characterize this alleged decrease in choice as a virtual denial of their fundamental right to vote: when "choice is foreclosed," they say, "voting itself becomes a sham." This is overstatement at best. The plaintiffs' argument is not really that choice is "foreclosed." Rather, they are making an empirical claim that the five percent or 1250 rule (as incorporated in Sessions Law 586) establishes a likelihood of *significantly reduced* choice in districts with fewer Republicans compared to more heavily Republican districts. In making this claim, the plaintiffs rely on evidence from the last contested Republican presidential primary in New York, the 1988 election in which George Bush, Robert Dole, Jack Kemp, and Pat Robertson were candidates. Plaintiffs report that in the 1988 primary, Bush delegates were the only delegates on the ballot in four of the eight districts with the fewest Republicans.[18] In addition, as the chart at note indicates, *supra*, in the fifteen districts with the fewest Republicans, no district had more than two candidates. In the fifteen districts with the most Republicans,[19] on the other hand, six districts had three candidates and two had four.

The plaintiffs' statistical evidence does not establish, however, that the five percent signature requirement significantly limits their choices as compared with voters living in districts subject to the 1250 signature requirement. Specifically, the evidence does not indicate a

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[18] The Eleventh, Sixteenth, and Eighteenth districts were subject to the five percent rule, and the Tenth district was subject to the 1250 cap.

[19] These districts are subject to the 1250 cap, and thus slates of delegates are required to collect less than five percent of registered Republican signatures in order to get on the ballot.

causal connection between the challenged regulation and the alleged injury. True, a choice of one, or none, is arguably no choice at all. But a closer look at all of the districts substantially undermines the plaintiffs' argument. There appears to be no appreciable correlation between the number of registered Republicans and the incidence of "no choice" (*i.e.*, one or no candidate) ballots. While the seventeen districts with the fewest Republicans (the bottom half of the districts) included seven single-candidate districts, the seventeen districts with the most Republicans (the top half) included four districts with one candidate and three with none.[20] The top and bottom thirds each contain five such districts. Thus, one-candidate and no-candidate districts appear to be randomly distributed. Even the most heavily Republican district had only Bush delegates on the ballot.

There does appear to be a correlation between (a) the districts with more than two candidates on the ballot and (b) the number of registered Republicans in those districts; none of the fifteen least Republican districts had more than two candidates on the ballot. But we think that the difference between three slates and two slates is decidedly less significant than the difference between two slates and one slate. The contention that the fundamental right to vote is infringed in single-candidate dis-

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[20] According to the defendants' appendix, multiple delegate slates filed petitions in the Twenty-Eighth, Twenty-Ninth, and Thirty-Fourth districts, but none made it to the ballot. Any conclusion about the significance of their elimination from the ballot requires considerable speculation. Such speculation, if we were willing to pursue it, could cut either way. For example, lack of approved candidates may mean that the requisite number of signatures was so hard to obtain (perhaps because the districts are rural or expansive) that candidates could not get a sufficient margin of signatures to insure against technical challenges. The signature requirement may then have been effectively more onerous in these three districts than in smaller districts.

tricts (where there is arguably no choice) is a very different contention (and a much stronger one) than the contention that the fundamental right to vote is infringed in districts with two candidates on the ballot. Thus, the plaintiffs ultimately fail to prove this point by failing to show a correlation between single-candidate districts and the effective percentage signature requirement in those districts.

The plaintiffs' equal protection argument also fails because it focuses exclusively on the choice of presidential candidates, and focuses not at all on the delegate slates. Even if it is true that Republican voters in a district with few Republicans are less likely to have a choice on their primary ballot than voters in a heavily Republican district, the plaintiffs still have not established that there is a right to equal degrees of choice in voting for different people in different districts. The plaintiffs would quarrel with this characterization of the March 7 election as a vote for different people. They claim that the delegate selection process amounts to a unitary statewide election in which the primaries in all thirty-one congressional districts will be held on the same day, will designate delegates to the same national convention, and will be seen widely as a unitary state presidential primary. However, there is no getting around the fact that—notwithstanding the unitary impact that the overall vote will have—there will be thirty-one elections on March 7. Each district will send its own slate of three delegates to the Republican National Convention. No two districts will send the same person.

Not only will there be thirty-one different elections, but the elections will produce ninety-three different delegates rather than one presidential candidate. Theoretically, these ninety-three delegates could be pledged to as

many as thirty-one different presidential candidates; or the delegates might be split, forty-eight for one candidate and forty-five for another. Some districts may elect delegates who are uncommitted. Delegates pledged to a particular candidate who thereafter drops out of the presidential race may arrive at the convention uncommitted, or committed (or brokered) to someone else.

Although popular attention may well focus on the number of delegates pledged to each candidate at the convention, the delegates themselves will also cast votes on platform issues and issues of party governance. No doubt, the chief purpose of many voters will be to send a message on presidential candidates. But that does not mean that we must treat these thirty-one elections as if they were a straw poll.[21] In short, registered Republicans in each district will be electing a slate of three people who are pledged to vote for a particular candidate, who may be freed to vote for anyone, and who will vote at the convention on other issues as well.

The other flaw with the plaintiffs' argument is that the disparity in percentage requirements—which, they contend, unconstitutionally burdens their fundamental right to vote—provides them with a substantial benefit. The same statistics used by the plaintiffs to discount the value of a Republican vote in the Eleventh District can plausibly demonstrate the enhanced value and power of

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[21] A look at the numbers bears out this observation. Assume that each of two candidates has a slate of delegates on the ballot in each district. If all the registered Republicans in the eight most heavily Republican districts vote for candidate A, and fifty-one percent of the registered Republicans in the other twenty-three districts vote for candidate B, then A will win the putative "presidential primary" by a commanding seventy-one percent to twenty-nine percent margin. But B will have won a landslide (seventy-four percent to twenty-six percent) in the election of delegates.

each such vote. If every registered Republican in the Eleventh District voted in a primary, each voter would have 1/11,814th of a say in deciding who the convention delegates would be. In the Third District, however, each voter has only 1/158,097th of a say in making the same decision. In a congressional election—for which state law allows use of the same formula—this advantage enjoyed by Republicans in the Eleventh District is offset by the fact that a Republican nominee in the heavily Democratic Eleventh is much less likely to arrive in Congress than a Republican nominee in the Third. In electing convention delegates, however, the Eleventh District's advantage remains undiluted. Thus the 11,814 registered Republicans in the Eleventh District (constituting 0.4 percent of the total number of registered Republicans in the State) send the same number of delegates to the national convention as the 158,097 registered Republicans in the Third (constituting 5.8 percent of statewide registered Republicans). Using this dynamic, the vote of the Eleventh District Republicans in Brooklyn is fourteen times more powerful than the vote of their fellow Republicans in Long Island's Third District.[22] In percentage terms, it is perhaps more work for activists in the Eleventh to put a slate on the ballot, but the number of signatures required is fewer (591) and

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[22] In fact, this was one part of the plaintiffs' claim below, at least for the four plaintiffs from districts heavily populated with Republicans (including one plaintiff from the Third District). The district court's injunction does not affect this claim, it is not dealt with in the district court's opinion, and the plaintiffs do not press it on appeal. That issue is therefore not before us. We note, though, that the claim that a vote for delegates from a district with relatively few Republicans is much more powerful than a vote from a heavily Republican district is a disparity inherent in the National Republican Party's decision to give an equal number of delegates to each congressional district. As such, the issue may not be justiciable. *See Wymbs v. Republican State Executive Comm. of Florida*, 719 F.2d 1072, 1082-83 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984).

the influence of each vote is greater. This situation may or may not furnish enough incentive to produce multiple candidacies, but it cannot be fairly characterized as a foreclosure of choice, a sham, or a mockery of the election process. If anything, the plaintiffs' ability to have a say in who the Republican Party nominates for President is very well protected.

This case is therefore markedly different from *Socialist Workers Party*, relied on by the district court to support its determination that strict scrutiny is the appropriate test here. *Socialist Workers Party* concerned the right of voters to cast their votes in a general election for a wide variety of parties and candidates, other than those nominated by the two major parties. Without these choices, socialist workers could not "cast their votes effectively." 440 U.S. at 184. *See Norman v. Reed*, 502 U.S. 279, 289 (1992) (citing *Socialist Workers Party* for the proposition that "severe" burdens on the right to form new political parties merits strict scrutiny); *Clements v. Fashing*, 457 U.S. 957, 964-65 (1982) (plurality opinion) (*Socialist Workers Party* applies only to ballot access classifications involving small political parties or independent candidates); *Unity Party v. Wallace*, 707 F.2d 59, 63 (2d Cir. 1983) (citing *Socialist Workers Party* for the proposition that classifications burdening independent candidates or small political parties are subjected to strict scrutiny). As discussed above, however, the plaintiffs are not deprived of their ability to "cast their votes effectively." Republican voters on March 7 will select delegates who may or may not vote at a subsequent party convention for the presidential candidate listed next to the delegate's name on the ballot, or who may be uncommitted from the start. Voters from districts with relatively few Republicans may per-

haps enjoy less choice among delegates than their fellow party members in more heavily Republican districts, but they gain an amplified voice by the equal impact of their small numbers. Finally, New York's signature requirement requires fewer signatures in districts with fewer registered Republicans, in contradistinction to *Socialist Workers Party*, where more signatures were required in a place with fewer voters (a scheme that would apparently have failed even the rational basis test, under the Court's analysis).[23] *See* note , *supra*.

At most, the plaintiffs can show that the signature requirement makes it less likely that they will have a broad choice in a primary among potentially uncommitted delegates to a national party convention. The case most analogous (in fact almost identical) to this one is *Hewes v. Abrams*, 884 F.2d 74 (2d Cir. 1989), in which we examined a signature requirement similar to the one at issue here. That case reviewed a different provision of New York Election Law § 6-136, which required candidates for Mayor of New York City to collect signatures from the lesser of five percent or 10,000 of the registered voters in the candidate's party in order to qualify for the ballot. The plaintiff was the candidate of the Right to Life Party. Because his party had only 6,000 registered voters, he needed signatures from five percent of them to get on the ballot. Candidates of the Democratic and Republican Parties, each party having more

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[23] In fact, under one reading of *Socialist Workers Party*, that case *requires* us to uphold this signature percentage requirement rather summarily. As discussed at note 14, *supra*, after applying strict scrutiny, the Court constructively edited the five percent signature requirement for Illinois political subdivisions, converting it to a "five percent or 25,000, whichever is less" requirement. Thus, while the Court struck down one disparity—Illinois could not simultaneously require 35,000 signatures in Chicago (five percent) and 25,000 signatures in Illinois (0.5 percent)—it allowed another to remain.

than 200,000 enrolled voters, could avail themselves of the 10,000-signature numerical cap. This was 0.5 percent of registered Democrats, and 2.4 percent of registered Republicans. *Id.* at 75; *Hewes v. Abrams*, 718 F. Supp. 163, 164 (S.D.N.Y. 1989). Like the plaintiffs here, the plaintiff in *Hewes* claimed that this scheme violated his equal protection rights. After summarizing the facts and the parties' arguments, we said: "We affirm substantially for the reasons stated by [District Court] Judge Haight in his thorough opinion." 884 F.2d at 75. Judge Haight's reasoning is therefore the law of this Circuit. *See United States v. Chila*, 871 F.2d 1015, 1018 (11th Cir.), *cert. denied*, 493 U.S. 975 (1989). Judge Haight held that rational basis review applied to the State's signature requirement: "Where, as here, the plaintiff has not shown invidious discrimination based upon wealth or race classifications or a preclusion of the right to vote, heightened scrutiny is not required." 718 F. Supp at 166 (internal quotations omitted). The court upheld the requirement, finding that the State's "important" interest in requiring that candidates have "a modicum of support" before they get on the ballot supplied a rational basis for the rule. *Id.* at 166 (citing *Jenness v. Fortson*, 403 U.S. 431, 442 (1971)).

Here, the plaintiffs' right to vote is certainly not "preclu[ded]." Nor do we believe, after reviewing the plaintiffs' evidence and the nature of this election, that the disparity in the percentage signature requirements significantly burdens their right to vote. We therefore hold that strict scrutiny does not apply.

V

We apply a rational basis analysis. *See McDonald v. Board of Election Comm'rs*, 394 U.S. 802, 806-07 (1969); *Schulz v. Williams*, 44 F.3d 48, 58 (2d Cir. 1994); *Unity Party*, 707 F.2d at 63. The plaintiffs point to a disparity between districts with many Republicans and districts with few Republicans. The State must advance a justification for the five percent or 1250 rule that is rationally related to a legitimate state interest. New York has determined that it is permissible to choose delegates to national conventions from congressional districts. It has also determined, consistent with the Supreme Court's holding in *Jenness*, 403 U.S. at 442, that requiring candidates to submit petitions signed by five percent of the district's enrolled Republicans is consistent with the goal of weeding out candidates who do not have "a modicum of support." The State has further determined that the five percent rule would impose an unnecessary burden in districts with many Republicans (like the Third), where an unmitigated five percent requirement would require 7905 signatures on a delegate's petition. New York has concluded that a petition signed by 1250 Republicans shows a "modicum of support." This effort to balance two goals—restricting ballot access to candidates who show some percentage of support, and providing a safety valve when the across-the-board percentage formula forces candidates in certain districts to collect more signatures than a number sufficient to show a modicum of support—is rational. *See Socialist Workers Party*, 440 U.S. at 187 (striking down statute that imposed five percent signature requirement on all political subdivisions, and effectively converting statute to a five percent or 25,000 signature requirement, whichever is less).

Under the district court's logic, a numerical cap would, in virtually all cases, be an unconstitutional approach for a state to take in balancing the desire for liberal ballot access with the need to ensure that candidates achieve some modicum of support. As the plaintiffs point out in their cross-appeal, the district court's 1.41 percent solution creates its own disparity, the "deviation of two to one between the maximum percentage [1.41 percent] and the minimum percentage [0.79 percent]." The plaintiffs argue that this disparity is unjustifiable and that the only way to end it is to enforce a 0.79 percent or 1250 formula: that is, to adopt as the percentage requirement the lowest percentage of voters able to field a slate of delegates in any district under the statutory formula. In that district, the Third, the 1250 signatures required equals 0.79 percent of registered Republicans. Of course, this would eliminate the disparity by adopting what is in effect an across-the-board flat percentage, because the 0.79 percentage will require fewer than 1250 signatures in every district but the Third, where it will (by design) require exactly 1250. Under this logic, a state could never alleviate a perceived hardship created by the percentage-based signature requirement because any numerical cap—if it is efficacious—would create a disparity requiring the "correction" urged by the plaintiffs. But by remedying an unconstitutional ballot access rule through the imposition of its own numerical cap in *Socialist Workers Party*, the Supreme Court has taken precisely this approach and, in effect, held that it is a rational one. *See id.* at 187.

There is another rational justification for the ballot access rule that is quite strong. As we have discussed, each vote in a district with relatively few Republicans is

given much more weight that an individual vote in heavily Republican districts. Thus, a state may rationally require candidates in those districts to get support from a higher proportion of voters, and may rationally expect that the opportunity to elect the same number of delegates with many fewer votes will furnish an incentive for candidates to circulate petitions. In this way, a state counterbalances the disproportionate weight that each Republican's vote has in a less populous district. Still another rational justification might be based on a state's conclusion that 1250 signatures reflect a greater level of support in more rural districts, where people are widely dispersed and where the actual collection process may be more arduous. We do not need to decide whether each of these government interests by itself would support the signature requirement. Together, they certainly constitute sufficient, legitimate governmental interests to which New York's five percent or 1250 formula is rationally related.

We do not express any opinion as to the wisdom of the five percent requirement. That decision is for the state legislature and the Republican Party, not the federal courts.

The plaintiffs have failed to prove either a likelihood of success on the merits or sufficiently serious questions going to the merits. Therefore, the judgment of the district court is reversed, and the order is vacated.

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LARRY ROCKEFELLER; HOLACE MORANCI; NEIL MORANCI; DONNA MORANCI; MARY PARRISH; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER and CORNELIUS P. DUGAN,

Plaintiffs,

– against –

WILLIAM POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE; NEW YORK STATE BOARD OF ELECTIONS; OWEN T. SMITH, CAROL BERMAN, EVELYN J. AQUILA, and HELENA MOSES DONOHUE, Commissioners, New York State Board of Elections; NEW YORK CITY BOARD OF ELECTIONS; DOUGLAS KELLNER, VINCENT CUTTITA, PAUL MEJIAS, VINCENT J. VELELLA, WEYMAN A. CAREY, RONALD J. D'ANGELO, SEYMOUR SHELDON, KATHLEEN WAGNER, GERTRUDE STROHM and FERDINAND MARCHI, Commissioners, New York City

MEMORANDUM

95 CV 4478 (ERK)

Board of Elections; ERIE COUNTY BOARD OF ELECTIONS; ROGER BLACKWELL and RALPH MOHR, Commissioners, Erie County Board of Elections; NASSAU COUNTY BOARD OF ELECTIONS; STEPHEN SABBETH, Commissioner, Nassau County Board of Elections; SUFFOLK COUNTY BOARD OF ELECTIONS; GERALD EDELSTEIN and GERALD BERGER, Commissioners, Suffolk County Board of Elections; MONROE COUNTY BOARD OF ELECTIONS; M. BETSEY RELIN and RONALD J. STARKWEATHER, Commissioners, Monroe County Board of Elections; NATIONAL REPUBLICAN COMMITTEE,

Defendants.

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Korman, J.

The purpose of this memorandum is to set out in somewhat more detail the reasons I stated on the record on November 27, 1995, for granting a preliminary injunction in this civil rights action brought pursuant to 42 U.S.C. § 1983. Plaintiffs are registered Republican voters residing in the 1st, 3rd, 4th, 10th, 11th, 12th, 14th, 28th, and 29th congressional districts, all of whom intend to vote in the Republican Primary on March 7, 1996, at which ninety-three delegates to the Republican National Convention will be selected. Although their complaint has a broader scope, by order to show cause plaintiffs sought injunctive relief with respect to the "petitioning phase" of the Republican presidential primary in New York. The process involves the circulation of petitions containing

the names of delegates committed to a particular presidential candidate whose name appears on the petition and on the ballot. Plaintiffs contend that the process mandated by New York law and Republican Party rules violates the Equal Protection Clause of the Fourteenth Amendment and the First Amendment of the United States Constitution.

The general framework for the New York Republican primary was decided on at the 1992 National Convention. At that time, the Convention determined that for the 1996 Convention the delegates would be allocated nationwide as follows: three delegates per congressional district, six additional delegates per state, and some number of "bonus" delegates for each state based on the state's success in supporting and/or electing Republicans.

On August 8, 1995, the Governor of New York signed into law a statute providing two alternative means by which a delegate candidate could have his or her name placed on the primary ballot. *See* 1995 N.Y. Laws Ch. 586. Under one alternative, delegates are required to obtain signatures from 5% or 1250 of the enrolled party members in their districts, whichever is less. *See id.* Ch. 586(2). Under the other alternative, the requirements are substantially less burdensome: 0.5% or 1000, whichever is less. *See id.* Ch. 586(3). While the legislation offers each political party the option of which alternative to choose, it has been the practice in recent presidential election years for the Legislature to pass an authorizing statute that merely codifies each party's preferred method of organizing its primary. What appear to be the options from which the parties may choose are in fact the choices they have already made. The option requiring 0.5% or 1000 is the one requested by the Democratic Party and the option requiring 5% or 1250 is the one requested by the Republican Party.

On October 31, 1995, the last day on which to exercise its option, the Republican State Committee formally notified the New York Board of Elections that it had chosen the alternative that would impose the 5% or 1250 requirements on candidates for delegate. Because of the uneven distribution of

Republicans in New York State, the 5% or 1250 requirement imposes very different burdens on different districts. Of the State's thirty-one congressional districts, only six contain fewer than 25,000 Republicans and are therefore forced to comply with the full 5% requirement. The other twenty-five districts receive the benefit of the 1250 cap, which corresponds to a percentage substantially below 5%. Indeed, the uncontested data submitted by plaintiffs reveal that in twenty of the thirty-one districts, the operative percentage is 1.54% or less and in sixteen it is 1.41% or less. In eight districts it is less than 1% and in the district with the most Republicans it is 0.79%. The following chart shows the number of enrolled Republicans in each congressional district ("CD") and the percentage actually required. The asterisks indicate districts that are too small to benefit at all from the 1250 cap.

CD	*#/Republicans*	*#/Signatures*	*%*
3	158,097	1250	.79
22	153,824	1250	.81
27	148,319	1250	.84
4	148,013	1250	.84
23	143,555	1250	.87
31	137,952	1250	.91
24	136,788	1250	.91
1	129,111	1250	.97
25	124,260	1250	1.01
26	116,360	1250	1.07
19	114,008	1250	1.10
29	113,561	1250	1.10
28	112,797	1250	1.11

2	112,442	1250	1.11
20	102,232	1250	1.22
13	88,350	1250	1.41
21	86,470	1250	1.45
5	85,213	1250	1.47
18	85,062	1250	1.47
30	80,970	1250	1.54
14	52,555	1250	2.38
9	52,511	1250	2.38
7	46,303	1250	2.70
8	33,247	1250	3.76
6	26,457	1250	4.72
17	23,090	1155	5.00*
12	20,215	1011	5.00*
10	17,114	856	5.00*
15	15,561	778	5.00*
16	14,852	743	5.00*
11	11,814	591	5.00*

When viewed against these figures, the option chosen by the Republican Party can be more accurately described as requiring 1.54% or less in two-thirds of the congressional districts and a far greater percentage in most of the remaining congressional districts, including six where the percentage increases to 5% as the number of enrolled Republicans decreases. The highest percentage, which means the greatest burden, applies to districts with the fewest enrolled

Republican voters. The burden of obtaining the requisite number of signatures is made even more difficult by the rule precluding an enrolled Republican from signing more than one petition and by a host of arcane technical requirements. *Cf. Jenness v. Fortson*, 403 U.S. 431, 442 (1971) ("The 5% figure is . . . apparently somewhat higher than the percentage of support required to be shown in many States as a condition for ballot position, but this is balanced by the fact that Georgia has imposed no arbitrary restrictions whatever upon the eligibility of any registered voter to sign as many nominating petitions as he wishes.").

Plaintiffs' attack on the constitutionality of imposing such different burdens implicates two distinct lines of analysis. First, the *burden* imposed on plaintiffs in a particular district can be examined under the Due Process Clause to determine whether it places too great a restriction on ballot access, regardless of the burdens imposed in other districts. Second, the *difference* between the burdens placed on plaintiffs and voters in other districts must be analyzed under the Equal Protection Clause.[1]

Regulations that impose burdens that are generally applicable to all voters are usually treated deferentially under a balancing test. As the Supreme Court held when reviewing a Hawaii law that prohibited voting for write-in candidates at primary and general elections:

> the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights. Thus, as we have recognized when those rights are subjected to "severe" restrictions, the regulations must be "narrowly drawn to

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[1] By distinguishing these two analytical inquiries, I do not mean to obscure the fact that the categories can overlap and are often intertwined or left undistinguished in the relevant case law. *See Norman v. Reed*, 502 U.S. 279, 288 n.8 (1992).

> advance a state interest of compelling importance." But when a state election law provision imposes only "reasonable, nondiscriminatory restrictions" upon the First and Fourteenth Amendment rights of voters, "the State's important regulatory interests are generally sufficient to justify" the restrictions.

Burdick v. Takushi, 504 U.S. 428, 434 (1992) (internal citations omitted); *see also Unity Party*, 707 F.2d 59, 61-62 (2d Cir. 1983).

In contrast, the cases dealing with requirements that treat similarly situated voters differently have imposed a more probing, less deferential level of scrutiny under the Equal Protection Clause. The analysis in these cases may assume that, if the restrictions in question were evenly applied, they would meet the balancing test articulated in *Burdick*. The critical inquiry in these cases is whether the *difference* in the burdens imposed can be justified. Where the difference is de minimis, only a rational basis is required. Where it "impairs the voters' ability to express their political preferences," heightened scrutiny is required. *Illinois State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 184-85 (1979); *see also Unity Party*, 707 F.2d at 63.

A simple hypothetical illustrates the distinction between the two lines of analysis. If New York, which now opens the polls for sixteen hours in a general election, reduced the number to one hour, that would clearly constitute an undue burden on the right to vote, even if applied uniformly across New York State. If the number of hours was ten, that figure could arguably survive a Due Process/First Amendment challenge under the balancing test articulated in *Burdick* and other cases. The ten-hour voting day would, however, be subject to further scrutiny if it applied in New York City while the sixteen-hour day applied in the rest of New York State. The scrutiny would be heightened if it could be shown that the distinction was deliberately drawn to advantage one party or another. Simply stated, a restriction that would withstand a Due Process/First Amendment challenge, could nonetheless

fail to survive a challenge made under the Equal Protection Clause, if not applied uniformly.[2]

The issue presented here is whether the scheme the Legislature has put in place can survive the scrutiny mandated by the Equal Protection Clause. The Legislature has essentially said that any independent state interest in regulating ballot access could be satisfied by the 0.5% requirement contained in the alternative option it gave the Democratic and Republican parties and which the Democratic Party has adopted. I assume for purposes of this case that New York State may defer to the judgment of the Republican Party that more than 0.5% should be required as minimal support for a delegate candidate. Nonetheless, because the state "collaborates in the conduct of the primary, and puts its power behind the rules of the party," *Gray v. Sanders*, 372 U.S. 368, 374 (1963), the Republican Party is a state actor when it selects ballot access rules and it cannot promulgate rules that offend the Equal Protection Clause.

The leading case analyzing ballot access signature requirements under the Equal Protection Clause is *Illinois State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173 (1979), in which Justice Marshall examined a state ballot access law requiring candidates for statewide office to obtain 25,000 signatures but requiring candidates for citywide office to obtain signatures from 5% of the number of voters who voted at the previous election. As applied, the law required candidates for citywide office in Chicago to obtain nearly 36,000 signatures. In approaching this incongruous result, Justice Marshall noted that ballot access restrictions implicate the right to vote because " 'voters can assert their preferences only through candidates or parties or both.' By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." *Id.* at 184 (quoting *Lubin v.*

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[2] The reverse is also true. A uniformly applied ballot access restriction could survive an equal protection challenge and nonetheless fail to withstand a due process challenge.

Panish, 415 U.S. 709, 716 (1974)). "When such vital individual rights are at stake," Justice Marshall continued, "a State must establish that its classification is necessary to serve a compelling interest." *Id.*

Justice Marshall acknowledged that candidates seeking a place on the ballot could be required to make "a preliminary showing of a 'significant modicum of support'" in order to obtain a place on the ballot. *Id.* at 185 (quoting *Jenness*, 403 U.S. at 442). These requirements serve, at the very least, the state's interest "in avoiding confusion, deception, and even frustration of the democratic process in the general election." *Jenness*, 403 U.S. at 442. States may, therefore, seek "to assure that the winner of an election is 'the choice of a majority, or at least a strong plurality, of those voting, without the expense and burden of runoff elections.' " *Socialist Workers Party*, 440 U.S. at 185 (quoting *Bullock v. Carter*, 405 U.S. 134, 145 (1972)).

Nonetheless, in setting the modicum of support necessary to obtain a place on the ballot, "a State may not choose means that unnecessarily restrict constitutionally protected liberty." *Id.* at 185. States must instead choose "the least drastic means to achieve their ends." *Id.* (quoting *Kusper v. Pontikes*, 414 U.S. 51, 58-59 (1973)). Justice Marshall reasoned that requiring 36,000 signatures from candidates seeking office in Chicago was "plainly not the least restrictive means of protecting the State's objectives" because "[t]he Illinois Legislature has determined that its interest in avoiding overloaded ballots in statewide elections is served by the 25,000 signature requirement." *Id.* at 186. Given the lower requirement placed on candidates in a statewide election, where a far greater number of voters were eligible to sign petitions, Justice Marshall found "no reason, much less a compelling one, why the State needs a more stringent requirement for Chicago." *Id.* at 186; *see also Norman v. Reed*, 502 U.S. 279, 293-94 (1992) (striking down Illinois law for same "constitutional flaw" at issue in *Socialist Workers*); *cf. Bullock v. Carter*, 405 U.S. 134, 148 (1972) (finding no justification for filing fees in party primary where "candidates for offices requiring

statewide primaries are generally assessed at a lower rate than candidates for local offices").

The same equal protection analysis led the Seventh Circuit to strike down unequal ballot access requirements in *Gjersten v. Board of Elec. Comm'rs*, 791 F.2d 472, 474 (7th Cir. 1986). At issue there was a state law regulating the internal structure and election procedures of political parties. The law required candidates for the Cook County central committee from the city's "wards" to collect signatures from 10% of the party's primary electors in the ward, but required candidates from the suburban "townships" to obtain signatures from only 5% of their electors. *See id.* at 474. In striking down the added burden on the wards, the Seventh Circuit recognized that the ballot access law manifested

> the explicit legislative judgment that a five-percent signature requirement was sufficient to protect the state's interest in an election for the same office in suburban Cook county. Although provided ample opportunity, the defendants presented no justification for the ten-percent requirement. In the absence of such a justification, the equal protection analysis developed in *Socialist Workers Party* does not require the court to further balance interests of the state against the rights of the candidates and voters.

Id. at 477. The holding in *Gjersten* also makes it plain that whether the number of signatures is expressed as a percentage or as a raw number makes no difference in the analysis. The relevant comparisons are between the actual burdens imposed in different districts.

The Second Circuit has not yet had the occasion to apply the equal protection analysis developed by the Supreme Court in *Socialist Workers Party* and applied by the Seventh Circuit in *Gjersten*. It has, however, recognized that the analysis of ballot access restrictions under the Equal Protection Clause must carefully examine the impact of those restriction as applied:

> An analysis of statutory language alone will not reveal the true dimension of a claimed denial of [voting] rights. We must also examine the nature, extent and likely effect of the law on the interest of those claiming to be fenced out by it. Only then can it be determined whether there exists a significant burden on fundamental rights or on a protected class such that heightened scrutiny is mandated. When the full scope of the obstacle to the exercise of these rights and the burden on the class is revealed, then the inquiry turns to the State's interests that purport to justify it.

Unity Party, 707 F.2d at 61-62 (internal citations omitted). Under this approach, the ballot access requirements adopted by New York State and the Republican State Committee cannot be sustained because, as applied, they unreasonably discriminate based on the number of Republicans enrolled in a congressional district. In those districts in which it is easier to find a needle in haystack than an enrolled Republican, they require signatures from a percentage of enrolled Republicans three times greater than is required in the large majority of congressional districts, where the number of enrolled Republicans approaches or substantially exceeds 100,000 and the difficulty of finding them is greatly reduced.

. . . . . .

The different burdens the requirements impose raise exactly the same question for the defendants here as in *Socialist Workers Party* and *Gjersten*: If the Republican Party, as a state actor, is willing to accept a relatively low burden--represented by a low percentage--in most districts, then what is the justification for imposing a much higher burden--represented by a 5% requirement--in other districts where it is already *more* difficult to find potential petition signers? The only justification appears to be a desire to increase the advantage already enjoyed by the presidential candidate favored by the Party organization. The favored candidate has the benefit of an in-place organization that can gather the required signatures for delegates with relative ease. Differences in the burdens imposed in different districts are unlikely to have any

significant practical effect on the ability of delegates pledged to the favored candidate to obtain the requisite number of signatures. In contrast, such differences may have a substantial impact on candidates who are independent of the party organization. Because of shortages of time and resources, these candidates, engaging in national campaigns, may be forced to forego petitioning in many small districts and focus only on districts, or other states, where ballot access is relatively easy. In the congressional districts in New York with the fewest Republicans, the Party's candidate will be locked in and voters who would have voted for other candidates will be locked out.

The harm caused by this scheme is not limited to the particular voters whose right to vote in a particular election is rendered meaningless. Overly restrictive ballot access laws have the more generalized effect of stifling political expression because they tend to deprive candidates of a significant vehicle for disseminating ideas as well as attaining elective office. As Justice Marshall observed in *Socialist Workers Party*:

> The State's interest in screening out frivolous candidates must be considered in light of the significant role that third parties have played in the political development of the Nation. Abolitionists, Progressives, and Populists have undeniably had influence, if not always electoral success. As the records of such parties demonstrate, an election campaign is a means of disseminating ideas as well as attaining political office. Overbroad restrictions on ballot access jeopardize this form of political expression.

Socialist Workers Party, 440 U.S. at 185-86 (internal citations omitted). In the context of a major party's primary, candidates who are independent of the party organization are, in many ways, analogous to third parties at a general election. Although at the primary all candidates are members of the same party, they represent different political ideas and have different qualifications for national and party leadership. Such

candidates, like third parties, have "undeniably had influence, if not always electoral success." *Id.* at 185-86.[3] Primaries in which they can meaningfully participate often provide the only means for changing the direction and assuming the leadership of the major political parties. As Theodore White observed in his history of the 1968 presidential election:

> In hindsight one can see that [Nelson] Rockefeller was challenging the entire structure of his Party--as were [Eugene] McCarthy and [Robert] Kennedy on the other side; his resources were greater than those of the two Democrats, certainly in statehouse support if not in troops. But structures do not yield except under pressure. *In politics, one challenges establishments in primaries, not elections. John F. Kennedy had done so in 1960, McCarthy was doing so in 1968, Rockefeller himself had made a near thing of it in 1964.*

Theodore H. White, *The Making of the President, 1968* 230 (1969) (emphasis added).

If discriminatory requirements prevent "independent" candidates from obtaining the requisite number of signatures to place on the ballot delegates pledged to them, then the primary becomes little more than a state-sponsored endorsement of the candidate of the party leadership. While the New York State Republican Party, with the assent of the Legislature, may choose an alternative method of delegate selection that would effectively permit its leadership to select delegates to the Republican National Convention, that objective cannot justify discriminatory ballot access requirements when the Party has chosen to have its delegates selected in a primary

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[3] Senator Eugene McCarthy's near victory in the New Hampshire primary and his anticipated victory in the Wisconsin primary played a major role in bringing down a sitting President of his own party over an issue of national policy. This story is chronicled in Theodore H. White, *The Making of the President, 1968* Chs. 3-4 (1969).

election conducted under the auspices of the State. As Professor Tribe has summarized the applicable law:

> [W]hile the Supreme Court has never required a state to hold elections for any particular office, "once the franchise is granted to the electorate, lines may not be drawn that are inconsistent with the Equal Protection Clause of the Fourteenth Amendment." Such "inconsistent lines" may be found in state laws effecting unequal absolute deprivations on the right to vote, or in the state laws responsible for only marginal, relative inequalities in the distribution of the right to vote.

Laurence H. Tribe, *American Constitutional Law* § 16-11, at 1461-61 (2d ed. 1988) (footnotes omitted) (quoting *Harper v. Virginia Bd. of Elec.*, 383 U.S. 663, 665 (1966)). Under any test--strict scrutiny, balancing of interests, or rational basis--the rules at issue here, which have the practical effect of limiting voters' choices and curtailing political expression, cannot be sustained. The only legitimate objective that they further--requiring a minimum modicum of support--could be achieved in a far more rational and less restrictive way by a scheme that did not unjustifiably impose such different burdens in different districts.

While uniform burdens could result in higher access requirements rather than lower ones, the more uniform the burden the less likely it is to be overly burdensome. Those in the majority are rarely willing to achieve equality by submitting themselves to the burdens they readily place on small minorities. Accordingly, it is unlikely that the Republican State Committee would impose a burden as high as 5% if it affected more than a small minority of districts in which Republicans constitute a small percentage of the voting population. This reality reflects the full dimension of the equal protection guarantee.

Because challenges to ballot access restrictions often occur at the eleventh hour, the Court of Appeals for the Second

Circuit has not addressed the possible justifications that a state may have for adopting signature requirements that, when applied, do not fall uniformly on all voters and candidates. There are, however, four thoughtful opinions, relied upon by defendants here, that address this issue in related contexts. *See Hewes v. Abrams*, 718 F. Supp. 163 (S.D.N.Y.) (Haight, J.), *summarily aff'd*, 884 F.2d 74 (2d Cir. 1989); *Mahon v. Abrams*, No. 88 Civ. 1745 (S.D.N.Y. Mar. 21, 1988) (Sand, J.), *aff'd without op.*, 847 F.2d 835 (2d Cir. 1988); *McGee v. Board of Elec. of New York*, 669 F. Supp. 73 (S.D.N.Y. 1987) (Weinfeld, J.); *Meyerson v. Board of Elec. of New York*, No. 87 Civ. 6168 (S.D.N.Y. Sept. 3, 1987) (Leisure, J.). While each of these cases is distinguishable from the present case, they warrant some discussion here.

Both *McGee* and *Meyerson* rejected challenges to the portion of New York's ballot access scheme that required candidates for county offices in Bronx County to obtain signatures from 5000 enrolled voters but required candidates for county offices in Nassau and Suffolk Counties to obtain only 2000 signatures.[4] Even though the population of all three counties was roughly the same, the disparity was considered to be rational because the higher population density in the Bronx made it easier to obtain 5000 signatures in the Bronx than in Nassau and Suffolk Counties. The requirement of 2000 signatures in the two less densely populated counties simply equalized the ballot access burdens. As Judge Leisure observed in *Meyerson*: "In light of this difference in population density, it is wholly rational for the New York Legislature to conclude that two thousand signatures in Nassau County represents approximately the same degree of support for a candidate as five thousand signatures in Bronx County due to the greater ease with which signatures may be gathered in the

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[4] The overall scheme imposed a signature requirement of 5% of enrolled voters for all county offices. The law then capped the number of signatures required at 5000 for counties in New York City but at only 2000 for all other counties with more than 250,000 inhabitants.

Bronx because of greater population density." *Meyerson*, No. 87 Civ. 6168, at 14.

Both *Meyerson* and *McGee* recognize that, in comparing different burdens, the most important consideration is not the absolute number or the percentage of signatures required, but the extent of the actual, practical burden placed on candidates and voters. Under certain circumstances, raising or lowering the total number of signatures and/or the percentage of signatures required in certain districts equalizes rather than amplifies differences among districts. This rationale would not, however, explain the system reflected by the record here because it deliberately places a heavier burden on districts where the fewest number of enrolled Republicans reside.

In *Mahon*, Judge Sand rejected a challenge to the 1988 equivalent of the New York Session Law challenged by plaintiffs here. He found that plaintiffs had raised a fair basis for litigation but denied the motion for a preliminary injunction. To the extent the denial rested primarily on the untimeliness of the plaintiffs' lawsuit, which was instituted after the petitioning phase and sought access to the ballot for candidates in districts where they had gathered no signatures, the case is clearly distinguishable. To the extent Judge Sand preliminarily addressed the case on its merits, his opinion reflects my first impression that a numerical cap of 1250 that eases the requirements in the districts that would be most heavily burdened by a 5% signature requirement is not unconstitutional on its face. I also agree with Judge Weinfeld that a state can decide that, although a certain number of signatures "is the *general requirement* for showing the modicum of support to be placed on the ballot, a *lesser showing* will be allowed in specific contests." *McGee*, 669 F. Supp. at 80. In practice, however, the 1250 cap applies not only to the largest districts, but to nearly all of the districts. The generally applicable modicum of support required is, therefore, not 5%, but some percentage based on the 1250 requirement. In two-thirds of the districts the percentage is 1.54 or less. Under the circumstances, the cap has created an exception that swallows almost all of the rule and renders irrational what remains of it.

Judge Haight's opinion in *Hewes* is more troubling. In that case, the Right to Life Party's candidate for mayor of New York City objected to a ballot access law requiring candidates to obtain signatures from 5% of the enrolled members of their respective parties or 10,000, whichever was less. In New York City, the law in practice required Democrats to obtain signatures from 0.5% of their party, Republicans to obtain signatures from 2.4% of their party, and Right to Lifers to obtain the full 5% because their party had only 6,000 members. *See Hewes*, 718 F. Supp. at 164. The plaintiff sought an injunction requiring that the signature requirement for all parties be reduced to 0.5%, the lowest percentage required of any party. Judge Haight denied the injunction and dismissed the complaint. He held that the statute needed only to survive rational basis review and that it did so in part because the cap was a legitimate means of avoiding requiring large parties to gather an unreasonably high number of signatures. *See id.* at 167.

I agree that once a state has selected a percentage that represents the appropriate modicum of support it may institute a cap to liberalize ballot access. What I do not agree with is the inference, accepted by Judge Haight in *Hewes*, that 5% was the modicum of support actually required by the ballot access scheme at issue. The scheme in *Hewes* required only primary candidates from the established minor parties to obtain the signatures of 5% of the enrolled party members, while it required less than half that percentage from the Republican Party and one tenth of that from the Democratic Party.[5] Moreover, if no Right to Life candidate met the disproportionately high burden and the Right to Life Party was left

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[5] Even if the different requirements at issue in *Hewes* violated the Equal Protection Clause, I would not have granted the remedy he sought. Under the reasoning I discuss below, I would have set the percentage as high, but no higher, than would be needed to subject a majority of parties to the same general rule.

without a nominee, the effect would be to eliminate an independent party from the ballot.

In any event, *Hewes* is distinguishable because it addressed signature requirements that differed as between political parties. These parties were of vastly different sizes. A major party's candidate for mayor in New York City, despite the low percentage requirement, would still be required to gather more signatures than there were voters in the Right to Life Party. Given the advantage that such a candidate would enjoy over candidates from smaller parties at the general election, a state might rationally require small party candidates to show stronger intra-party support than candidates from larger parties in order to be placed on the primary ballot. I need not now consider whether this reasoning permissibly protects the ballot from unnecessary clutter or impermissibly limits voters' choices. I need only note that the same rationale would not explain requirements that are the same for everyone within a district but vary so significantly from district to district for the same party position.

The foregoing discussion reflects my conclusion that plaintiffs have established a likelihood of success on the merits. Nonetheless, I decline to foist on the Republican Party the relief requested by plaintiffs, namely, an order requiring no more than 0.79% of the enrolled Republicans to place a delegate candidate on the ballot. This is the percentage required under the current scheme in the congressional district with the largest number of enrolled Republicans. The underlying purpose of the Legislature was to grant the Republican Party latitude in fixing the minimum modicum of support it deemed appropriate. According the same deference to the desire of the Republican Party to fix whatever number it deems appropriate, any relief should permit the Party to define a "modicum of support" at the highest percentage consistent with the Equal Protection Clause. Consistent with the analysis in *Socialist Workers Party*, I determined that level based on the minimum percentage of signatures required in a majority of congressional districts. The data furnished to me by the plaintiffs, which no one has disputed, demonstrate that if the

requirement was 1.41% or 1250, 16 of 31 districts would have to meet the percentage requirement and 15 of 31 would benefit from the cap. The 1.41% requirement could then rationally be characterized as a generally applicable rule and the 1250 cap as an exception that liberalizes ballot access.

The scope of my order is necessarily limited. Because this case was not brought as a class action I have only the specific plaintiffs before me. The plaintiffs include voters in four districts that would benefit from a 1.41% requirement: the 10th, 11th, 12th, and 14th districts. Voters from the other districts that would benefit are not represented here and plaintiffs here have no standing to object to their potential lack of choices on primary day. I, therefore, ordered the defendants not to require otherwise valid signatures of more than 1.41% of enrolled Republicans from delegates seeking access to the ballot in the Republican primary in the 10th, 11th, 12th, or 14th districts.

I have granted relief because plaintiffs have shown a likelihood of success on the merits and of irreparable harm on the day of the primary, but I have also considered the public interest, which is always "a factor to be considered in the granting of a preliminary injunction." *Carey v. Klutznick*, 637 F.2d 834, 839 (2d Cir. 1980). The relief I have granted threatens no harm to the public interest because, if I am correct that the ballot access restrictions chosen by the Republican Party have the effect of reducing the choices available to voters in many districts, the only possible effect of my order may be to increase the choices available to voters in the affected districts. These choices will still be limited to candidates who have shown the level of support that the party itself considers sufficient to justify ballot access in a most other districts and who are able to overcome other burdens that are not at issue here. Indeed, for this reason, even if this were a class action, the preliminary injunction would have either little or no effect in two-thirds of the congressional districts. Because there is not even a rational basis for requiring a far greater level of support in the minority of congressional districts with the

fewest enrolled Republicans, the public interest is not disserved by granting injunctive relief.

/s/Edward R. Korman

United States District Judge

Dated: Brooklyn, New York
December 13, 1995

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LARRY ROCKEFELLER; HOLACE MORANCI; NEIL MORANCI; DONNA MORANCI; MARY PARRISH; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER and CORNELIUS P. DUGAN,

Plaintiffs,

STEVE FORBES, individually and as a Candidate for President of the United States,

Plaintiff-Intervenor,

– against –

WILLIAM POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE; NEW YORK STATE BOARD OF ELECTIONS; OWEN T. SMITH, CAROL BERMAN, EVELYN J. AQUILA, and HELENA MOSES DONOHUE, Commissioners, New York State Board of Elections; NEW YORK CITY BOARD OF ELECTIONS; DOUGLAS KELLNER, VINCENT CUTTITA, PAUL MEJIAS, VINCENT J. VELELLA, WEYMAN A. CAREY, RONALD J.

ORDER

95 CV 4478 (ERK)

D'ANGELO, SEYMOUR SHELDON, KATHLEEN WAGNER, GERTRUDE STROHM and FERDINAND MARCHI, Commissioners, New York City Board of Elections; ERIE COUNTY BOARD OF ELECTIONS; ROGER BLACKWELL and RALPH MOHR, Commissioners, Erie County Board of Elections; NASSAU COUNTY BOARD OF ELECTIONS; STEPHEN SABBETH, Commissioner, Nassau County Board of Elections; SUFFOLK COUNTY BOARD OF ELECTIONS; GERALD EDELSTEIN and GERALD BERGER, Commissioners, Suffolk County Board of Elections; MONROE COUNTY BOARD OF ELECTIONS; M. BETSEY RELIN and RONALD J. STARKWEATHER, Commissioners, Monroe County Board of Elections; NATIONAL REPUBLICAN COMMITTEE,

Defendants.

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This cause came to be heard on plaintiff-intervenor's motion for a preliminary injunction under Federal Rule of Civil Procedure 65 (the "Motion"), and the Court having considered the amended complaint, the oral and written affirmations of Thomas J. Spargo in support of the Motion and having heard argument on the Motion in open court, and it appearing to this Court that insofar as Chapter 586(2) of the 1995 Session Laws of the State of New York ("Chapter 586(2)") incorporates by reference Rule 24 of the Rules of the Republican State Committee, which, in turn, incorporate the

designating petition signature requirements for congressional districts set forth in N.Y. Election Law Section 6-136, as applied, it is likely to be held unconstitutional, and that certain plaintiffs will be irreparably harmed in the absence of preliminary injunctive relief; and this Court's oral decision on November 27, 1995, a transcript of which has been made, and this Court's written Memorandum filed December 13, 1995, being incorporated by reference insofar as they include and set forth in greater detail this Court's findings of facts and conclusions of law; it is hereby

ORDERED that defendants William J. Powers ("Powers"); New York Republican State Committee ("State Committee") (Powers and the State Committee, collectively, the "Party Defendants"); the New York State Board of Elections and its commissioners, Owen T. Smith, Carol Berman, Evelyn J. Aquila, and Helen Moses Donohue (the "State Board"); and the New York City Board of Elections and its commissioners, Douglas Kellner, Vincent Cuttita, Paul Mejias, Vincent J. Velella, Weyman A. Carey, Ronald D'Angelo, Seymour Sheldon, Kathleen Wagner, Gertrude Strohm and Ferdinand Marchi ("City Board") (the State Board and the City Board, collectively, the "Government Defendants") – and all of the Party Defendants' and Governmental Defendants' officers, directors, principals, agents, servants, employees, successors and assigns, and all those acting in concert or participation with them throughout this State – be and hereby are preliminarily restrained and enjoined, pending the determination of this action, as follows:

1. from authorizing, applying, enforcing, or validating Chapter 586(2) and Rule 24 of the Rules of the State Committee to the extent that such statute or rule would, absent this Order, have the effect of requiring any person seeking to qualify as a candidate for election as a district delegate or alternate district delegate to the 1995 Republican National Convention ("Delegate") at the New York Republican Presidential Primary election to be held on March 7, 1996, in the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Fourteenth, Fifteenth, Sixteenth, Seventeenth,

Eighteenth, Twenty-First or Thirtieth Congressional Districts in the State to demonstrate that s/he collected valid signatures of more than 1.41% of enrolled Republican voters in the congressional District in which s/he resides and from which s/he seeks election as a Delegate; and

2. in the case of the Governmental Defendants, from disqulaifying petitions designating candidates in the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Twenty-First and Thirtieth Congressional Districts, in accordance with Chapter 586(2), to the extent that Chapter 586(2) and Rule 24 of the Rules of the State Committee would, absent this Order, have the effect of requiring any person seeking to qualify as a candidate for delegate at the New York Republican Presidential Primary to be held on March 7, 1996, in the Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, Twelfth, Fourteenth, Fifteenth, Sixteenth, Seventeenth, Eighteenth, Twenty-First or Thirtieth Congressional District in the State to demonstrate that s/he collected valid signatures of more than 1.41% of enrolled Republican voters in the Congressional District in which s/he seeks access to the ballot;

3. defendants' motion to stay execution of the Order until January 4, 1996, is denied.

SO ORDERED

/s/Edward R. Korman

Edward R. Korman
United States District Judge

Dated: Brooklyn, New York
December 13, 1995

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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LARRY ROCKEFELLER; HOLACE MORANCIE; NEIL MORANCIE; DONNA MORANCIE; MARY PARRISH; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER and CORNELIUS P. DUGAN,

Plaintiffs,

– against –

WILLIAM POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE; NEW YORK STATE BOARD OF ELECTIONS; OWEN T. SMITH, CAROL BERMAN, EVELYN J. AQUILA, and HELENA MOSES DONOHUE, Commissioners, New York State Board of Elections; NEW YORK CITY BOARD OF ELECTIONS; DOUGLAS KELLNER, VINCENT CUTTITA, PAUL MEJIAS, VINCENT J. VELELLA, WEYMAN A. CAREY, RONALD J. D'ANGELO, SEYMOUR SHELDON, KATHLEEN WAGNER, GERTRUDE STROHM and FERDINAND MARCHI, Commissioners, New York City

95 CV 4478 (ERK)

ORDER GRANTING PRELIMINARY INJUNCTION

Board of Elections; ERIE COUNTY BOARD OF ELECTIONS; ROGER BLACKWELL and RALPH MOHR, Commissioners, Erie County Board of Elections; NASSAU COUNTY BOARD OF ELECTIONS; STEPHEN SABBETH, Commissioner, Nassau County Board of Elections; SUFFOLK COUNTY BOARD OF ELECTIONS; GERALD EDELSTEIN and GERALD BERGER, Commissioners, Suffolk County Board of Elections; MONROE COUNTY BOARD OF ELECTIONS; M. BETSEY RELIN and RONALD J. STARKWEATHER, Commissioners, Monroe County Board of Elections; NATIONAL REPUBLICAN COMMITTEE,

Defendants.

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This cause came to be heard on plaintiffs' motion for a preliminary injunction under Federal Rule of Civil Procedure 65 (the "Motion"), and the Court having considered the amended complaint, the affirmations and memoranda submitted in support and in opposition to the Motion and having heard argument on the Motion in open court, and it appearing to this Court that insofar as Chapter 586(2) of the 1995 Sessions Laws of the State of New York ("Chapter 586(2)") incorporates by reference Rule 24 of the Rules of the Republican State Committee, which, in turn, incorporate the designating petition signature requirements for congressional districts set forth in N.Y. Election Law Section 6-136, as applied, it is likely to be held unconstitutional, and that certain plaintiffs will be irreparably harmed in the absence of preliminary injunctive relief; and this Court's oral decision on

November 27, 1995, a transcript of which has been made, being incorporated herein by reference insofar as it includes and recites this Court's findings of facts and conclusions of law; it is hereby

ORDERED that defendants William J. Powers ("Powers"); New York Republican State Committee ("State Committee") (Powers and the State Committee, collectively, the "Party Defendants"); the New York State Board of Elections and its commissioners, Owen T. Smith, Carol Berman, Evelyn J. Aquila, and Helen Moses Donohue (the "State Board"); and the New York City Board of Elections and its commissioners, Douglas Kellner, Vincent Cuttita, Paul Mejias, Vincent J. Velella, Weyman A. Carey, Ronald D'Angelo, Seymour Sheldon, Kathleen Wagner, Gertrude Strohm, and Ferdinand Marchi ("City Board")(the State Board and the City Board, collectively, the "Governmental Defendants") -- and all of the Party Defendants' and Governmental Defendants' officers, directors, principals, agents, servants, employees, successors and assigns, and all those acting in concert or participation with them throughout this State -- be and hereby are preliminarily restrained and enjoined, pending the determination of this action, as follows:

1. from authorizing, applying, enforcing, or validating Chapter 586(2) and Rule 24 of the Rules of the State Committee to the extent that such statute or rule would, absent this Order, have the effect of requiring any person seeking to qualify as a candidate for election as a district delegate or alternate district delegate to the 1996 Republican National Convention ("Delegate") at the New York Republican Presidential Primary election to be held on March 7, 1996 in the Tenth, Eleventh, Twelfth or Fourteenth Congressional Districts in the State to demonstrate that s/he collected valid signatures of more than 1.41% of enrolled Republican voters in the Congressional District in which s/he resides and from which s/he seeks election as a Delegate; and

2. in the case of the Governmental Defendants, from disqualifying petitions designating candidates for Delegate

to be elected at the New York Republican Presidential Primary from the Tenth, Eleventh, Twelfth and Fourteenth Congressional Districts, in accordance with Chapter 586(2), to the extent that Chapter 586(2) and Rule 24 of the Rules of the State Committee would, absent this Order, have the effect of requiring any person seeking to qualify as a candidate for Delegate at the New York Republican Presidential Primary to be held on March 7, 1996 in the Tenth, Eleventh, Twelfth or Fourteenth Congressional District in the State to demonstrate that s/he collected valid signatures of more than 1.41% of enrolled Republican voters in the Congressional District in which s/he seeks access to the ballot;

3. defendants' application for a stay of this order is denied.

SO ORDERED

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Edward R. Korman
United States District Judge

Dated: Brooklyn, New York
December 1, 1995

APPENDIX F

§ 6-136. Designating petitions; number of signatures

1. [Eff. until Jan. 1, 1995. See, also, subd. 1 below.] Petitions for any office to be filled by the voters of the entire state must be signed by not less than fifteen thousand or five per centum, whichever is less, of the then enrolled voters of the party in the state, of whom not less than one hundred or five per centum, whichever is less, of such enrolled voters shall reside in each of one-half of the congressional districts of the state.

1. [Eff. Jan. 1, 1995, as amended by L.1994, c. 659. See, also, subd. 1 above.] Petitions for any office to be filled by the voters of the entire state must be signed by not less than fifteen thousand or five per centum, whichever is less, of the then enrolled voters of the party in the state, (excluding voters in inactive status) of whom not less than one hundred or five per centum, whichever is less, of such enrolled voters shall reside in each of one-half of the congressional districts of the state.

2. [Eff. until Jan. 1, 1995. See, also, subd. 2 opening par. below.] All other petitions must be signed by not less than five per centum, as determined by the preceding enrollment, of the then enrolled voters of the party residing within the political unit in which the office or position is to be voted for, provided, however, that for the following public offices the number of signatures need not exceed the following limits:

2. [Eff. Jan. 1, 1995, as amended by L.1994, c. 659. See, also, subd. 2 opening par. above.] All other petitions must be signed by not less than five per centum, as determined by the preceding enrollment, of the then enrolled voters of the party residing within the political unit in which the office or position is to be voted for (excluding voters in inactive status), provided, however, that for the following public offices the number of signatures need not exceed the following limits:

(a) For any office to be filled by all voters of the city of New York, seven thousand five hundred signatures;

(b) For any office to be filled by all the voters of any county or borough within the city of New York, four thousand signatures;

(c) For any office to be filled in the city of New York by all the voters of any municipal court district, one thousand five hundred signatures;

(c-l) For any office to be filled in the city of New York by all the voters of any city council district, nine hundred signatures;

(d) For any office to be filled by all the voters of cities or counties, except the city of New York and counties therein, containing more than two hundred fifty thousand inhabitants according to the last preceding federal enumeration, two thousand signatures;

(e) For any office to be filled by all the voters of cities or counties containing more than twenty-five thousand and not more than two hundred fifty thousand inhabitants, according to the last preceding federal enumeration, one thousand signatures;

(f) For any office to be filled by all the voters of any other city or county, or of a councilmanic district in any city other than the city of New York, five hundred signatures;

(g) For any office to be filled by all the voters of any congressional district, twelve hundred fifty signatures;

(h) For any office to be filled by all the voters of any state senatorial district, one thousand signatures;

(i) For any office to be filled by all voters of any assembly district, five hundred signatures;

(j) For any office to be filled by all the voters of any political subdivision, except as herein otherwise provided, contained within another political subdivision, not to exceed the number of signatures required for the larger subdivision;

(k) For any other office to be filled by the voters of a political subdivision containing more than one assembly district, county or other political subdivision, not to exceed the aggregate of the signatures required for the subdivisions or parts of subdivisions so contained; and

(l) For any county legislative district, five hundred signatures.

3. The number of signatures on a petition to designate a candidate or candidates for the position of delegate or alternate to a state or judicial district convention or member of the state committee or assembly district leader or associate assembly district leader need not exceed the number required for member of assembly, and to designate a candidate for the position of district delegate to a national party convention need not exceed the number required for a petition for representative in congress.

(As amended L.1991, c. 90, § 27; L.1992, c. 79, § 15; L.1993, c. 418, § 1; L.1994, c. 659, § 42.)

Historical and Statutory Notes

1994 Amendments. Subds. 1, 2. L.1994; c. 659, § 42, in subd. 1 and opening par. of subd. 2 inserted "(excluding voters in inactive status)". For eff. date, see note below.

1993 Amendments. Subd. 2, par. (c-l). L.1993, c. 418, § 1, eff. July 21, 1993, substituted requirement of 900 signatures for offices in New York City filled by voters of any city council district for requirement of 900 signatures for offices in New York City filled by voters of any city council district from which members other than council president are chosen.

1992 Amendments. Subd. 1. L.1992, c. 79, § 15, eff. Jan. 1, 1993, reduced minimum number of required signatures on certain petitions to 15,000 or 5% of enrolled voters, whichever is less, from 20,000 or 5% of enrolled voters, whichever is less.

Subd. 2, par. (a). L.1992, c. 79, § 15, eff. Jan. 1, 1993, decreased number of signatures required on petitions for any office to be filled by all voters of the city of N.Y. to 7,500 from 10,000.

Subd. 2, par. (b). L.1992, c. 79, § 15, eff. Jan. l, 1993, decreased number of signatures required on petitions for any office to be filled by all voters in any county or borough within the city of N.Y. to 4,000 from 5,000 .

1991 Amendments. Subd. 2, par. (c). L.1991, c. 90, § 27, eff. May 3, 1991, redesignated former par. (c) as pars. (c) and (c-l) and in par. (c) added requirement of 1500 signatures for elections in municipal court districts.

Subd. 2, par. (c-l). L.l991, c. 90, § 27, eff. May 3, 1991, redesignated portion of former par. (c) as par. (c-l) and in par. (c-l) as so redesignated made signature requirement apply to city council districts from which members other than president are elected rather than to councilmanic districts from which members other than president and at-large members are elected according to New York city charter, and lowered such signature requirement from 1500 to 900.

Effective Date of Amendment by L.1994, c. 659; Forms for Implementation; Rules and Regulations. Amendment by L.1994, c. 659 eff. Jan. 1, 1995, but all necessary forms shall be prepared and printed far enough in advance to be available on that date, and any rules or regulations necessary for implementation shall be promulgated by that date, pursuant to L.1994, c. 659, § 55, set out as a note under Election Law § 5-211.

Law Review Commentaries

A call for reform of New York State's ballot access laws. Note 64 N.Y.U.L.Rev. 182 (1989).

APPENDIX G

McKINNEY'S 1995 SESSION LAW NEWS OF NEW YORK

218th Legislature

Additions are indicated by < < + Text + > >;
Deletions by < < - Text - > >

Changes in tables are made but not highlighted.

CHAPTER 586

S. 5385, A. 8100

ELECTIONS—NATIONAL PARTY CONVENTION OR CONFERENCE IN 1996—DELEGATES

Approved Aug. 8, 1995, effective as provided in section 5

AN ACT in relation to the election of delegates to a national party convention or a national party conference in 1996; and the "Spring" and "Fall" primary in such year and providing for the repeal of such provisions upon expiration thereof

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

§ 1. Notwithstanding any inconsistent provisions of the election law, a rule or resolution of a state committee providing for the selection of delegates and alternate delegates to a national party convention or national party conference in the year 1996 shall be consistent with either section two or section three of this act. A certified copy of such rule or resolution shall be filed with the state board of elections no later than the first day of November, 1995.

§ 2. As used in this section, the following terms shall have the following meanings:

a. "Presidential candidate" shall mean a person, who is a candidate for nomination to the office of president of the United States in the year in which the delegates and alternate

delegates whose election is hereinafter provided for shall be elected;

b. "District delegate" or "alternate district delegate" shall mean a delegate or alternate delegate, respectively, to a national party convention or national party conference, elected from any congressional district;

c. "District candidate" shall mean any candidate for election as a district delegate or alternate district delegate;

d. "At-large delegate" or "alternate at-large delegate" shall mean a delegate or alternate delegate, respectively, to a national party convention or national party conference, elected at-large by the state committee of a party, as the rules of a state committee may provide.

2. a. Delegates and alternate delegates to a national party convention or a national party conference shall be elected from congressional districts, or partly from the state at-large and partly from such districts, as the rules of the state committee may provide.

b. Delegates and alternate delegates from the state at-large shall be elected by the state committee of a party. The chairman or secretary of the state committee shall, not later than the third Tuesday in June, file with the state board of elections a certificate setting forth the names and addresses of those persons so elected.

c. District delegates and alternate district delegates to a national convention at which a person is to be nominated for the office of president of the United States shall be elected at the spring primary held in the year of any such convention.

d. All such candidates for election as delegate and alternate delegate to a national party convention or national party conference of any party shall be enrolled members of such party and all such candidates for election as district delegates and alternate district delegates must reside in the congressional district in which they are candidates.

3. Except as is otherwise provided in subdivision 4 of this section each candidate for district delegate or alternate district delegate to a national convention or conference of such party, at which a person is to be nominated for the office of president of the United States, shall be listed on the primary ballot as uncommitted.

4. a. Each district candidate shall set forth on each sheet of his designating petition immediately beside or below the title of the party position, the name of the presidential candidate supported by such district candidate or indicate thereon that he is uncommitted.

b. If more district candidates supporting the same presidential candidate file designating petitions in any district than there are positions to be filled, the board of elections with which such petitions are filed shall, not later than four days after the last day to file such petitions, notify the presidential candidate, or his authorized representative, of the names of all district candidates supporting such presidential candidate, if such presidential candidate has filed a certificate with the state board of elections specifying the address at which he shall be so notified or specifying the name and address of his authorized representative. The state board of elections shall forthwith notify the appropriate local boards of elections of the contents of any such certificate filed. Any such presidential candidate or his authorized representative may file a certificate with the board of elections with which the designating petitions for such positions are filed within twelve days after the last day to file such petitions, indicating which of the district candidates, not to exceed the number to be elected, shall have such presidential candidate's name placed on the primary ballot together with the district candidate's name. Such district candidates not chosen by the presidential candidate shall appear on the primary ballot as uncommitted. Such certificate may also include, in order of priority, a list of those district candidates who were not chosen, to be automatically substituted for any selected district candidate who is removed from the ballot. Whenever a board of elections receives such a certificate it shall, not later than two days after receipt, notify

by first class mail the candidate or candidates not chosen. Any such candidate may decline to have his or her name placed on the ballot by filing with the board of elections a statement of such declination. Such statement must be filed not later than the twentieth day after the last day to file petitions. If any such presidential candidate fails to file such a certificate for any such district, then all district candidates who have filed designating petitions in such district which list them as supporting such presidential candidate shall appear on the primary ballot as uncommitted.

c. The ballot shall be arranged so as to set forth immediately below or beside the name of each candidate for delegate and alternate delegate, the name of the presidential candidate supported by such candidate, or the word uncommitted.

d. A district candidate who files a designating petition that fails to set forth the name of a presidential candidate shall be listed on the primary ballot as uncommitted.

e. A person named as a presidential candidate on any designating petition for district candidates, may file a certificate with the state board of elections within twelve days after the last day to file designating petitions, requesting that his name not appear on the primary ballot next to the names of any district delegates and any district candidates who have filed designating petitions which list them as supporting such presidential candidate shall appear on the primary ballot as uncommitted. The state board of elections shall forthwith notify the appropriate local boards of elections of any such certificate filed.

f. District candidates supporting the same presidential candidate shall appear on the ballot as a single group. Uncommitted district candidates whose names appear on the same petition shall appear on the ballot as a single group. If candidates within a group are designated by separate petitions, the order within the group shall be determined by lot.

5. The state board of elections shall, not later than the fourth Tuesday in June, certify the names of those persons

elected as delegates and alternate delegates to a national convention.

6. Except as provided in this section and party rules and regulations, the provisions of the election law shall apply to elections conducted pursuant to this section.

§ 3. 1. The rules of the state committee of a party may provide that the delegates and alternate delegates to a national convention or national party conference be elected by a combination of all of the following methods:

a. By votes cast at a primary election for candidates for the office of president of the United States in which the names of candidates for such office appear on the ballot;

b. By votes cast at a primary election for candidates for the positions of delegate and alternate delegate to a national convention in districts no larger than congressional districts; and

c. By the state committee or a committee of the state committee at a meeting or convention called for such purpose as the rules of the party may provide.

2. If the rules of a state committee adopted pursuant to the provisions of this section provide for a primary election in which the office of president of the United States appears on the ballot, designation of candidates for such office shall be made pursuant to the provisions of sections 6-100. 6-118, 6-122 (except that such candidates need not be citizens of New York but only citizens of the United States), 6-130, 6-132 (except that references to a committee to fill vacancies shall be deemed reference to a committee to receive notices), 6-134 (except the provisions of subdivision four), 6-144, the provisions with respect to declinations in subdivisions 1 and 2 of section 6-146 (except that references to a committee to fill vacancies shall be deemed references to a committee to receive notices), 6-154, and subdivision 1 and the provision with respect to declinations in subdivision 2 of section 6-158 (except that such candidates may decline such designations not later than January 16, 1996) of the election law. The state

board of elections shall forthwith notify the appropriate local boards of elections of any such declination filed.

3. Designating petitions, where required for candidates for the office of president of the United States to be voted on by voters of the entire state in a primary election must be signed by not less than five thousand of the then enrolled voters of the party in the state.

4. If the rules of a state committee provide for a primary election in which the office of the president of the United States appears on the ballot, in addition to the spaces on the ballot with the names of the candidates designated for such office there may be a space with the word "uncommitted". The "uncommitted" space shall be listed on the ballot provided that a designating petition for such "uncommitted" space which meets the same requirements as a petition designating a candidate for the office of president of the United States is filed in the same manner as is required for such a petition.

5. a The form of a petition requesting that an "uncommitted" space be listed on the ballot at a primary election for the office of president of the United States held pursuant to the provisions of this section shall be substantially as follows:

I, the undersigned, do hereby state that I am a duly enrolled voter of the ..... Party and entitled to vote at the next primary election of such party to be held on the ..... day of ..... 19....., that my place of residence is truly stated opposite my signature hereto, and I do hereby request that an "uncommitted" space be listed on the ballot at the primary election of such party for the office of President of the United States.

b. The appointment of a committee to receive notices, the signatures on the petition with all the required information and the signed statement of a witness or authentication by a person authorized to take oaths, shall be in the form prescribed for a designating petition for such office.

6. a. If the rules of a state committee, adopted pursuant to the provisions of this section, provide that the positions of delegate and alternate delegate to a national convention appear on the ballot, designation of candidates for such positions shall be made pursuant to the provisions of sections 6-100, 6-118, 6-122, 6-130, 6-132 (except that references to a committee to fill vacancies shall be deemed references to a committee to receive notices), 6-134, 6-144, the provisions with respect to declinations in subdivisions 1 and 2 of section 6-146 (except that references to a committee to fill vacancies shall be deemed references to a committee to receive notices), 6-147, 6-154, and subdivision 1 and the provision with respect to declinations in subdivision 2 and subdivision 3 of section 6-158 of the election law.

b. Candidates for the positions of district delegate and alternate district delegate to a national party convention pursuant to the provisions of this section shall be enrolled members of such party and residents of the district in which they are candidates.

c. Designating petitions for candidates for such positions must be signed by at least one thousand enrolled voters of the party residing in the district in which such candidates are designated, or by at least one-half of one percent (0.5%) of the then enrolled voters of such party in such district or by a number of such enrolled voters equal to at least one-half of one percent (0.5%) of the votes cast in such district for all candidates for such party's nomination for president at the primary election held on April 7, 1992, whichever is less.

d. The designating petition for any such candidate or candidates shall have printed thereon prior to the affixing of any signatures thereto, a legend naming the presidential candidate whom such candidates are pledged to support, or a legend that such candidates are uncommitted. Such legend shall be part of the title of such position.

e. No designating petition containing the names of more than one candidate for either such position shall be valid unless all such candidates for such positions have printed on

such petition the legend that they are pledged to the same presidential candidate or unless all such candidates for such positions have printed on such petition the legend that they are uncommitted.

f. No designating petition containing the names of more than one candidate for either such position shall be presumptively valid unless the candidates for delegate as a group and the candidates for alternate as a group are equally divided between males and females, with a variance no greater than one.

g. In the event that a designating petition is filed for candidates for such positions sided as pledged to support a presidential candidate or as uncommitted, and the name of such presidential candidate, or the word uncommitted, will not appear on the ballot at the spring primary election in 1996, then the petition designating such candidates for such positions shall be null and void and the names of such candidates for such positions shall not appear on the ballot.

h. Every board of elections with which designating petitions are filed pursuant to the provisions of this section shall, not later than four days after the last day to file such petitions, file with the state board of elections by express mail or by electronic transmission, a complete list of all candidates for delegate and alternate delegate together with their residence addresses, the districts in which they are candidates and the name of presidential candidate whom they are pledged to support or that they are uncommitted. Such boards of elections shall, not later than the day after a certificate of declination or substitution is filed with respect to any such candidate file such information with respect to such candidate with the state board of elections by electronic transmission.

7. a. The rules of a state committee adopted pursuant to the provisions of this section may provide that no candidate for the positions of delegate and alternate delegate may appear on the ballot as pledged to support a particular presidential candidate, or as uncommitted, unless the name of such candidate for such position appears on a certificate listing the names of

those candidates for such positions who have filed statements of candidacy for such positions with the secretary of the state committee within the time prescribed by such rules and who, if their statements of candidacy contained a pledge of support of a presidential candidate, were not rejected by such presidential candidate. Such certificate shall also list the address and sex of each candidate for delegate and alternate delegate and the district in which such candidate may appear on the ballot.

b. Such certificate shall be filed by the secretary of such state committee, with the board of elections with which the designating petitions for such candidates for such positions are required to be filed, not later than January 19, 1996.

c. In the event that a designating petition for candidates for such positions, listed as pledged to support a presidential candidate, contains the names of one or more persons who have not been permitted by such presidential candidate to appear on the ballot as so pledged pursuant to the provisions of this section, then the names of such candidates shall not appear on the ballot but the names of other candidates on such petition who have been permitted by the presidential candidate to appear on the ballot, shall be placed on the ballot provided that such candidates are otherwise eligible and that such petition is otherwise valid.

d. The state board of elections shall send a copy of the certificate required by section 4-110 of the election law to the secretary of the state committee of each party conducting a primary pursuant to the provisions of this section. Every other board of elections with which designating petitions for delegate and alternate delegate were filed pursuant to the provisions of this section shall, not later than February 2, 1996, send a list of the names and addresses of those candidates who will appear on the ballot to the secretary of each such state committee.

8. a. If the rules of a state committee adopted pursuant to the provisions of this section provide for an election in which candidates for the office of president of the United States and

the word "uncommitted" and candidates for the positions of delegate and alternate delegate to a national convention appear on the ballot, such ballot shall be arranged in the manner prescribed by this section.

b. The name of each candidate for the office of president of the United States who has qualified to appear on the ballot and the word "uncommitted", if a valid designating petition to place such word on the ballot was filed with the state board of elections, shall appear in a separate row or column. The names of all the candidates for delegate to a national convention who filed designating petitions containing a legend naming the presidential candidate whom they are pledged to support or stating that they are uncommitted shall be listed in such row or column immediately under or adjacent to the name of such presidential candidate or the word "uncommitted", followed by the names of all candidates for alternate delegate to such convention who filed such petitions. If the number of candidates, or groups of candidates for delegate and alternate delegate who are pledged to support a particular presidential candidate or who are uncommitted is greater than the number who may be listed in one row or column and if there are more rows or columns available on the machines than are required for the candidates for president who have qualified to appear on the ballot, then the board of elections shall use two rows or columns on such machines to list the names of such candidates for delegate and alternate delegate.

c. The order of the names of candidates for the office of president and the word "uncommitted" on the ballot and the order of the names of candidates for the positions of delegate or alternate delegate within a particular row or column shall be determined pursuant to the provisions of subdivision 3 of section 7-116 of the election law except that names of candidates for such positions who are designated by individual petitions and not in a group shall have their positions determined by lot in the same drawing as groups and except further that candidates, or groups of candidates for delegates and alternate delegates designated by the same petition shall not be treated as one group for the purposes of such

determination by lot. The provisions of subdivision 6 of such section 7-116 of the election law shall not apply to any election conducted pursuant to the provisions of this section.

d. Immediately following the name of each candidate for delegate and alternate delegate on the ballot shall appear, in parenthesis, the letter (M) if such candidate is male and the letter (F) if such candidate is female.

9. All primary elections conducted pursuant to the provisions of this section shall be on voting machines. If the number of candidates who must be listed in rows or columns pursuant to the provisions of this section, exceeds the number of spaces in such rows or columns, the contest for the position of alternate delegate shall be placed on paper ballots. If the number of candidates who must be listed in rows or columns pursuant to the provisions of this section, still exceeds the number of spaces in such rows or columns, the contest for the position of delegate shall also be placed on paper ballots.

10. Persons entitled to vote pursuant to section 11-200 of the election law shall be entitled to sign designating petitions for, and vote in, any election held pursuant to the provisions of this section.

11. If the rules of a state committee provide for a primary election in which the office of president of the United States and the positions of delegate and alternate delegate to a national convention appear on the ballot pursuant to the provisions of this section, the state board of elections and the county boards of elections as the case may be shall canvass the results of such primary election for such office and positions pursuant to the provisions of sections 9-200 and 9-202 of the election law, and shall certify to the secretary of the state committee of such party the vote cast for each candidate for such office and positions in such primary election and the vote cast for the "uncommitted" preference, tallied separately by congressional districts, except that no candidate or "uncommitted" preference shall be certified as nominated or elected to any such office or position.

12. Except as provided in this section and party rules and regulations, all provisions of the election law, except any provisions of section 2-122 which are inconsistent with this section and those sections and subdivisions of article 6 not specified herein, shall apply to elections conducted pursuant to this section.

§ 4. Notwithstanding any other provision of law, the "Spring primary" in the year 1996, shall be held solely for the purpose of electing delegates and alternate delegates to a national convention and holding any elections conducted pursuant to the provisions of paragraphs a and b of subdivision one of section three of this act. Members of state and county committees and assembly district leaders and associate assembly district leaders and all other party positions to be elected in 1996 shall be elected at the "Fall primary" and all nominations for public office required to be made at a primary election in such year shall be made at the "Fall primary".

§ 5. This act shall take effect immediately and shall remain in full force and effect only until December 31, 1996 when it shall be deemed repealed.

APPENDIX H

NEW YORK REPUBLICAN STATE COMMITTEE

WILLIAM D. POWERS

Chairman

October 31, 1995

Thomas R. Wilkey
Executive Director
New York State Board of Elections
Swan Street Building
Core 1
Empire State Plaza
Suite 201
Albany, NY 12223

Dear Tom:

Please be advised that pursuant to Section 1 of Chapter 586 of the Laws of 1995, the New York Republican State Committee hereby provides notice that it will conduct the selection of delegates and alternate delegates to the 1996 Republican National Convention pursuant to Section 2 of such Chapter.

Rule 24 of the Rules of the New York Republican State Committee effectuates the provisions of Section 2 of Chapter 586 of the laws of 1995.

Very truly yours,

/s/William D. Powers

William D. Powers
Chairman

WDP/to

315 State Street Albany, New York 12218 (518) 462-2601

In the
Supreme Court of the United States

October Term 1995

LARRY ROCKEFELLER; HOLACE MORANCI; NEIL MORANCI; DONNA MORANCI; MARY PARRISH; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER; CORNELIUS P. DUGAN, and STEVE FORBES, individually and as a Candidate for President of the United States,

Petitioners,

-against-

WILLIAM POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE; NEW YORK STATE BOARD OF ELECTIONS; OWEN T. SMITH, CAROL BERMAN, EVELYN J. AQUILA, and HELENA MOSES DONOHUE, Commissioners, New York State Board of Elections; NEW YORK CITY BOARD OF ELECTIONS; DOUGLAS KELLNER, VINCENT CUTTITA, PAUL MEJIAS, VINCENT J. VELELLA, WEYMAN A. CAREY, RONALD J. D'ANGELO, SEYMOUR SHELDON, KATHLEEN WAGNER, GERTRUDE STROHM, and FERDINAND MARCHI, Commissioners, New York City Board of Elections; ERIE COUNTY BOARD OF ELECTIONS; ROGER BLACKWELL and RALPH MOHR, Commissioners, Erie County Board of Elections; NASSAU COUNTY BOARD OF ELECTIONS; STEPHEN SABBETH, Commissioner, Nassau County Board of Elections; SUFFOLK COUNTY BOARD OF ELECTIONS; GERALD EDELSTEIN and GERALD BERGER, Commissioners, Suffolk County Board of Elections; MONROE COUNTY BOARD OF ELECTIONS; M. BETSEY RELIN and RONALD J. STARKWEATHER, Commissioners, Monroe County Board of Elections; NATIONAL REPUBLICAN COMMITTEE,

Respondents.

To the Honorable Ruth Bader Ginsburg,
Associate Justice of the United States Supreme Court,
and Circuit Justice for the Second Circuit

For the reasons set forth in the accompanying petition for certiorari and application for recall of the mandate, the undersigned, as counsel for the petitioners herein, respectfully

seek and order pursuant to Title 28 U.S.C. Sec. 2101 (f), Title 28 U.S.C. section 1651, and Rules 22 and 23 of the Rules of the United States Supreme Court staying or, if necessary, recalling the mandate of the United States Court of Appeals for the Second Circuit, issued December 21, 1995, and reinstating the order of the United States District Court for the Eastern District of New York, dated December 13, 1995, enjoining the operation of certain provisions of Chapter 586(2) of the Laws of the State of New York as applied to the New York State Republican Presidential primary scheduled for March 7, 1996.

The decisions and orders below are set forth in the Appendix to the accompanying petition for certiorari.

Dated: New York, New York
February 9, 1996

Respectfully submitted,

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(2)

No. 95-1273

Supreme Court, U.S.
FILED
MAR 13 1996
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

LARRY ROCKEFELLER; HOLACE MORANCI; NEIL MORANCI; DONNA MORANCI; MARY PARRISH; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER; CORNELIUS P. DUGAN; and STEVE FORBES,

Petitioners,

v.

WILLIAM POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE; NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

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March 13, 1996

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PARTIES TO THE PROCEEDING

The plaintiffs are Larry Rockefeller, Holace Moranci, Neil Moranci, Donna Moranci, Mary Parrish, Lugenia Gordon, Helen Dalley, Betsy Webster, Betsy R. Blattmach, Nancy Burner, and Cornelius P. Dugan. Steve Forbes, as an individual and in his capacity as a candidate for President, is a plaintiff-intervenor.

The defendants are William D. Powers, Chairman, New York Republican State Committee; New York Republican State Committee; New York State Board of Elections; Owen T. Smith, Carol Berman, Evelyn J. Aquila, and Helena Moses Donohue, Commissioners, New York State Board of Elections; New York City Board of Elections; Douglas Kellner, Vincent Cuttita, Paul Mejias, Vincent J. Velella, Weyman A. Carey, Ronald J. D'angelo, Seymour Sheldon, Kathleen Wagner, Gertrude Strohm, and Ferinand Marchi, Commissioners, New York City Board of Elections; Erie County Board of Elections; Roger Blackwell and Ralph Mohr, Commissioners, Erie County Board of Elections; Nassau County Board of Elections; Suffolk County Board of Elections; Gerald Edelstein and Gerald Berger, Commissioners, Suffolk County Board of Elections; Monroe County Board of Elections; M. Betsey Relin and Ronald J. Starkweather, Commissioners, Monroe County Board of Elections.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-1273

LARRY ROCKEFELLER; HOLACE MORANCI; NEIL MORANCI; DONNA MORANCI; MARY PARRISH; LUGENIA GORDON; HELEN DALLEY; BETSY WEBSTER; BETSY M. BLATTMACHR; NANCY BURNER; CORNELIUS P. DUGAN; and STEVE FORBES,

Petitioners,

v.

WILLIAM POWERS, Chairman, New York Republican State Committee; NEW YORK REPUBLICAN STATE COMMITTEE; NEW YORK STATE BOARD OF ELECTIONS, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

---

RESPONDENTS' BRIEF IN OPPOSITION

Respondents New York Republican State Committee and its Chairman William D. Powers (collectively "State Party" or "Party") respectfully request that this Court deny the petition for a writ of certiorari on the grounds asserted by petitioners and affirm the Court of Appeals' judgment. Were the Court to grant certiorari, it should do so on the ground that this matter is non-justiciable as respondents show in their cross-petition for certiorari in this case filed on March 13, 1996.

OPINIONS AND ORDERS BELOW

The opinion of the court of appeals vacating the district court's preliminary injunction was issued January 18, 1996 and is reported officially at 74 F.3d 1367 (2nd Cir.); a copy of the decision is also reprinted at Appendix ("App.") 3a-37a of the plaintiffs' petition for writ of certiorari in this case. The memorandum of decision of the United States District Court for the Eastern District of New York is reported officially at 909 F. Supp. 863 (E.D.N.Y.) and is reproduced at App. 38a-57a.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment in this case on December 21, 1995, and issued an opinion on January 18, 1996. The petition for a writ of certiorari was filed on February 12, 1996. This Court has jurisdiction under 28 U.S.C. § 1254 (1) (1994).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, which provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Section one of the Fourteenth Amendment to the United States Constitution provides:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall

> abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The statutes involved in this case are Chapter 586(2) of the Laws of New York, and New York Election Law § 6-136, which are reproduced respectively at App. 66a-69a & 70a-81a.

This case also involves State Party Rule 24, which provides that:

> The selection of delegates and alternate delegates to [the Republican] National Convention shall be governed by the Rules of the Republican Party (National), the Call for the National Convention, the Rules of the New York Republican State Committee and New York State Election Law. . . . Candidates for the positions of delegate and alternate delegate shall qualify for the ballot of the primary election pursuant to the designating petition process delineated in Articles two (2) and six (6) of the New York State Election Law.

COUNTER STATEMENT OF THE CASE

Petitioners ask this Court to grant certiorari to review a panel decision of the United States Court of Appeals for the Second Circuit rejecting an equal protection challenge to the State Party's duly-adopted, non-discriminatory rules for selecting delegates to the Republican National Convention. Although the court of appeals should have disposed of petitioners' challenge on the ground that this intra-party dispute is non-justiciable, the panel's ruling that rational basis review applies and that the State Party's rules are clearly rational is consistent with this Court's precedent and should not be disturbed.

A. Republican Party Structure and Organization.

The Republican Party reconstitutes itself every four years through the selection of delegates to the Republican National Convention. When the Republican National Convention is in session, it is the highest authority in the Republican Party. *See* Powers Nov. 20, 1995 Affidavit in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction at ¶ 2. One important task that delegates to the Republican National Convention perform is nominating the Party's presidential and vice-presidential candidates. However, the delegates also write the Party platform, confirm delegate credentials, adjudicate delegate challenges, adopt Party rules, and otherwise provide for Party governance. *See* The Rules of the Republican Party: 1992 Republican National Convention, Attached in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction. When the Republican National Convention is in session, it *is* the National Republican Party.

B. The National Republican Party's Delegate-Selection Rules.

Since 1972, the delegates to the National Republican Convention have approved a rule requiring state parties to select three delegates to the convention from each congressional district in their state. *See* National Republican Party Rule 31(a)(2); Powers Nov. 20, 1995 Affidavit at ¶¶ 4-5. Delegates selected on this basis constitute the vast majority of the delegates to the Republican National Convention. *Id.* As a condition for having their delegates seated at the National Convention, all state Republican parties are required to conduct their delegate-selection processes consistent with National Republican Party Rules. *See* National Republican Party Rule 32(a)(2).

These delegate-selection requirements reflect several collective political judgments of the Republican Party. First,

the Republican Party has decided that the National Convention should be made up of delegates who reflect the diversity of the states and territories they represent; a congressional-district method of election was designed to ensure this goal. *See* Powers Nov. 20, 1995 Affidavit at ¶ 4. Second, the Republican Party believes that selecting convention delegates from every congressional district in the country makes it more likely that the delegates collectively will nominate a presidential candidate who can gain broad public support in the general election. *Id.* at ¶¶ 6-7. Finally, by requiring that convention delegates be selected from all 435 congressional districts, the Republican Party has sought to provide the broadest possible participation of party members in the candidate-selection process. *Id.* at ¶ 5.

C. Development of the State Party's Delegate-Selection Rule 24.

State Republican committees are responsible for establishing procedures and standards for implementing delegate selection within the national Party's standards. As the petitioners correctly point out, the New York legislature has "attempted to codify each major party's preferred method of organizing a Presidential primary." Petition for Writ of Certiorari at 5-6. This law explicitly defers to political parties and allows parties to establish their own standards for access to the primary ballot.[1]

Through Party Rule 24, the State Party collectively decided to incorporate the New York Election Law ("NYEL") petition requirements into its party rules. *See* Powers Nov. 20, 1995 Affidavit at ¶¶ 7 & 10. Under State Party Rule 24 and NYEL § 6-136, each slate of candidates for delegate or alternate delegate in each district must file a designating petiton containing the sig-

[1] *See* New York Sessions Law Chapter 586 (1995), App. 70a-81a (providing that political parties may choose the delegate-selection rules that will apply to their primaries).

natures of 1250 enrolled Republicans in their districts, provided that no slate must obtain signatures from more than 5% of the registered Republicans in the district. NYEL § 6-136, App. 66a-69a.[2] The State Party believes that prospective delegate slates have shown that they possess a significant modicum of support if they are able to obtain 1250 signatures, regardless of how many signatures potentially are available. However, to assure that an ample pool of Republican voters is available, no delegate slate is required to obtain signatures from more than 5% of the Republicans in a congressional district.

The State Party chose these delegate-selection rules to ensure that prospective delegate slates display a significant modicum of support before they appear on the Republican Party primary ballot. In addition, rather than choosing a primary process in which a delegate candidate can get on the ballot merely by paying a filing fee, the State Party decided to have a primary which fairly tested a candidate's organizational strength and competence as well as his or her ability to cultivate grass-roots support throughout New York State. *See* Buley Nov. 20, 1995 Affidavit in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Preliminary Injunction at ¶ 8; Powers Nov. 20, 1995 Affidavit at ¶ 7.[3]

The State Party is aware that the burden of obtaining the necessary signatures is not the same in all districts. It

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[2] Under New York law, the 1250 or 5% requirement also governs congressional primary elections. NYEL § 6-136(2)(g), App. 67a.

[3] The State Party has used these delegate-selection rules in its presidential primary for over 20 years. In 1992, due to a pending reapportionment, the RNC exempted the State Party from the three-delegate-per-district rule and allowed it to allocate two delegates to each district. However, once the 1992 reapportionment was completed, the State Party returned to the current rules. *See* Memorandum of Law of Defendants William D. Powers and New York Republican State Committee in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Their Motion to Dismiss All Claims at 2-3 n.2.

knows, for example, that obtaining signatures in rural districts is more difficult than in urban districts, because the voters are dispersed. *See, e.g.*, Congressional Quarterly's Politics in America 1994: The 103rd Congress at 1015, 1089 (1994) (detailing the "sprawling" twenty-fourth congressional district that extends from the eastern border of Lake Ontario to the Vermont border, and includes the Adirondack Park). On the other hand, many rural districts in New York State have a high proportion of Republicans. *See, e.g.*, Congressional Districts 24, 25, 26, and 27 in "New York State Board of Elections Enrollment By Congressional District April 95," Exhibit A to the Affirmation of Burt Neuborne in Support of Plaintiffs' Motion for Preliminary Injunction. As the trial court found, however, the requirement is not excessive in any district. *See* Nov. 27, 1995 Hearing Tr. at 11-12. In addition, the Party's delegate-selection process has proven remarkably effective in identifying candidates with broad appeal. Indeed, four of the last five winners of the New York Primary have gone on to win the Republican nomination. In addition, Republican Party leaders believe that the State Party's recent electoral success in New York is attributable to the strong grass-roots support for the Party that the petition process engenders. *See* Powers Nov. 20, 1995 Affidavit at ¶ 12.[4]

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[4] It should be noted that State Party members are given numerous opportunities to propose modifications to the Party's delegate-selection rules. In fact, at least one of the petitioners in this action—Lugenia Gordon—has repeatedly been permitted to propose modifications to the National Republican Party delegate-selection rules, but Ms. Gordon has been unable to persuade her fellow Republicans to change the rules. *See* State Party Dec. 8, 1995 Appeals Brief at 5. Having failed to persuade her fellow Republicans, Ms. Gordon and the other petitioners essentially seek to substitute their own judgment for that of the majority of their party.

D. District Court Proceedings.

On November 3, 1995, 11 registered Republicans ("plaintiffs" or "petitioners") brought suit in the United States District Court for the Eastern District of New York against the State Party and its Chairman William D. Powers, the Republican National Committee, the New York State Board of Elections, and a number of state and local election officials. Plaintiffs' amended complaint asserted various claims, including a claim that State Party Rule 24, New York Sessions Laws Chapter 586, and NYEL § 6-136 as applied violated the Equal Protection Clause of the Fourteenth Amendment. The plaintiffs' essential contention was that the Party's rules discriminated against districts with low Republican enrollments—which are located primarily in urban areas—while making it easier to qualify for the ballot in high-Republican districts.

On December 1, 1995, the district court ruled that the State Party's delegate-selection rules violated equal protection. The district court issued a preliminary injunction barring the State Party from using its rules in the March 7, 1996, New York presidential primary and barring New York election officials from enforcing state statutes that implemented the Party's rules. App. 63a-65a. The district court subsequently issued a memorandum opinion and order. App. 38a-57a.

In granting the preliminary injunction, the trial court found that the absolute burden imposed by Rule 24 is reasonable for all districts, ruling that the Party could impose a flat 5% requirement across the board. *See* 11/27/95 Hearing Tr. at 2.[5] The court concluded, however, that the equal protection clause compels the Party to fine-tune the Rule to require signatures from approximately the same percentage of Republicans in each district. Because the requirement of 1250 signatures works

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[5] Rule 24 never requires the signatures of more than 5% of the registered Republicans in any congressional district.

out to 1.41% of the Republicans in the majority of districts, the district court mandated that the 1.41% standard apply in all districts except for those in which 1250 signatures comprises a lower percentage.

The trial court made no finding that delegates within a district face unequal burdens vis-a-vis one another. Nor was there any finding that potential presidential candidates faced unequal treatment. To the contrary, *all delegates within a given district must meet the same standard.* Instead, the court's professed concern was that "independent" members of the Republican Party in districts with fewer registered Republicans might have less opportunity to vote for delegates pledged to candidates with limited party support than they would have if they lived in a district with a large number of registered Republicans. *See* 11/27/95 Hearing Tr. at 7-8. The court found this supposed differential burden based solely on the assumption that the key factor controlling the difficulty of obtaining signatures is the number of registered Republicans in a given district, giving no consideration to other demographic or geographic factors.

E. Court of Appeals Proceedings.

On December 21, 1995, a panel of the United States Court of Appeals for the Second Circuit heard the State Party's expedited appeal and, ruling from the bench, summarily reversed the trial court and vacated the preliminary injunction. On January 18, 1996, the panel issued a written opinion. App. 3a-37a.[6]

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[6] After the Second Circuit vacated its first injunction, the district court ruled that the State Party's delegate rules violated the First Amendment on February 21, 1996, issuing a second preliminary injunction enjoining the Party from using its rules in the March 7 primary. On February 29, 1996, the Second Circuit affirmed. Because the New York primary was just days away, and to avoid creating further electoral confusion, the State Party did not seek emergency relief from this Court prior to the primary. In order to vindicate and protect its constitutional rights, however, the State Party plans to file a petition for certiorari regarding the second injunction.

The panel ruled that in order for the State Party's delegate-selection rules to trigger strict scrutiny under the Fourteenth Amendment, the alleged discriminatory burden on plaintiffs' right to vote would have to be at least "substantial," if not actually "severe." App. 24a-25a n.16. The panel then found that even in those districts in which the signatures of 5% of the registered Republicans was required, no substantial or severe burden on ballot access existed. App. 27a-33a; 34a. Rather, the court concluded that the State Party and New York State had

> determined, consistent with the Supreme Court's holding in *Jenness*, 403 U.S. at 422, that requiring candidates to submit petitions signed by five percent of the district's enrolled Republicans is consistent with the goal of weeding out candidates who do not have a 'modicum of suport.'

App. 35a.

Accordingly, the panel applied rational-basis scrutiny to the State Party's delegate rules and found the rules to be "rational." App. 35a. The panel found that the State Party had determined that applying a 5% requirement across-the-board in all districts "would impose an unnecessary burden in districts with many Republicans (like the Third), *where an unmitigated five percent requirement would require 7905 signatures.*" *Id.* (emphasis added) The panel found the State Party's 1250 or 5% signature requirement to be a rational

> effort to balance two goals—restricting ballot access to candidates who show some percentage of support, and providing a safety valve when the across-the-board percentage formula forces candidates in certain districts to collect more signatures than a number sufficient to show a modicum of support.

Id.

SUMMARY OF ARGUMENT

Plaintiffs are asking the federal courts to referee an intra-party dispute over how persons who have voluntarily associated with one another for political purposes should select party delegates to their national convention. Plaintiffs cast themselves as independent of the mainstream Republican Party. Instead of working within the State Party—or simply leaving the Party—they have chosen to use a federal district court to try to effectuate changes to Party delegate-selection rules that they were unable to obtain from within the Party. This Court has repeatedly emphasized, however, that the associational rights of political parties are protected from outside state and judicial interference absent racial discrimination—which is not present here. Moreover, courts and states should especially defer to a party's judgment regarding appropriate ballot-access requirements where, as here, the party is choosing delegates for party office. First Amendment associational rights are at their peak when political parties decide such internal matters as the appropriate process for selecting National Convention delegates.

Not only did the district court inject itself into this inherently political dispute, it also erroneously held the State Party's delegate-selection rules to the strictest standard of judicial review. The Second Circuit appropriately applied rational basis review, concluding that not all ballot restrictions are subject to heightened scrutiny, especially where, as here, they involve non-discriminatory ballot- access requirements for the election of convention delegates. Thus, to the extent the State Party's delegate-selection rules are justiciable, only rational basis review would apply. Such review is fully satisfied here by the Party's compelling interest in making sure that candidates to Party election have a significant modicum of support before being placed on the ballot. In addition, these delegate-selection rules are a reasonable means of testing a candidate's organizational strength and ability to generate grass-roots support.

Finally, even if fine tuning of Rule 24 were constitutionally required, federal courts are not the appropriate tuners. The fact that no party to this case agreed with the ballot-access standard imposed by the district court highlights the inherently political nature of the delegate-selection process. Thus, any standard imposed by a district court would be innately arbitrary and subject to challenge.

REASONS FOR NOT GRANTING THE WRIT

I. PLAINTIFFS' CHALLENGE TO THE REPUBLICAN PARTY'S STANDARDS AND PROCEDURES FOR CHOOSING ITS CONVENTION DELEGATES IS NOT JUSTICIABLE.

Both the district court and the Second Circuit failed to recognize that the resolution of such inherently political issues as the appropriate method for selecting delegates to the national convention is simply not justiciable. This Court has made clear that a core component of the freedom of association protected by the First Amendment is "a political party's decisions about the identity of and *the process for electing,* its leaders." *Eu v. San Francisco County Democratic Comm.*, 489 U.S. 214, 229 (1988) (emphasis added); *see also Democratic Party of U.S. v. Wisconsin ex rel. LaFollette,* 450 U.S. 107, 124 (1981) ("[a] political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution"). The Second Circuit should have vacated the district court's preliminary injunction on this ground alone. For a fuller discussion of the non-justiciability of the State Party's rules relating to delegate selection, *see* the State Party's Cross-Petition for Certiorari filed on March 13, 1996.

II. IF EQUAL PROTECTION JURISPRUDENCE APPLIES, STATE PARTY RULE 24 HAS A RATIONAL BASIS AND THEREFORE SATISFIES THE APPROPRIATE STANDARD OF REVIEW.

A. As Party Rule 24 Does Not Severely Burden Any Fundamental Right, Strict Scrutiny Does Not Apply.

The Second Circuit aptly concluded that strict scrutiny does not apply to the delegate-selection process at issue here, as the right to vote has *not* been "significantly" burdened. *Rockefeller v. Powers*, App. 26. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (when an election requirement imposes only "reasonable, nondiscriminatory restrictions," the state must generally meet only the "slight" burden of showing that the requirement serves legitimate interests).[7] *See also Norman v. Reed*, 502 U.S. 279, 289 (1993) ("severe" burdens on the right to form new political parties merit strict scrutiny). Courts invoke strict scrutiny only upon a showing of "invidious discrimination" or a "preclusion of the right to vote." *McGee v. Board of Elections*, 669 F. Supp. 73, 77 (S.D.N.Y. 1987). As such a showing has not, and cannot, be demonstrated here, strict scrutiny should not apply.[8]

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[7] Of course, states have a "compelling interest" in structuring elections to "avoid[] confusion, deception, and even frustration of the democratic process . . . ," *Jenness v. Fortson*, 403 U.S. 431, 442 (1971), and are therefore allowed to narrow the field of candidates with "reasonable, nondiscriminatory restrictions" designed to demonstrate sufficient grass-root support to qualify for the ballot. *See LaRouche v. Kezer*, 990 F.2d 36, 40 (2d Cir. 1993) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

[8] Moreover, because New York contains three congressional districts subject to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. § 1973, the State Party submitted Rule 24 to the Department of Justice in 1991 for pre-clearance. In deciding whether to pre-clear election practices, the Department of Justice determines "[w]hether the submitted change has the purpose or will have the effect of denying or abridging the right to vote on account of race, color, or membership in a language minority

The Second Circuit easily determined that the requirements of Rule 24 do not impose a 'severe" burden on voters, concluding that "*the disparities* created by the five percent or 1250 rule do not even 'significantly' burden the plaintiffs' fundamental right to vote. . . ." *Rockefeller v. Powers,* App. 26a n.16.

Moreover, the requirements of Party Rule 24 parallel those requirements that govern candidates access to the ballot in many other New York elections—such as congressional primary elections. Courts have repeatedly applied rational basis analysis to these statutory requirements. *See Hewes v. Abrams,* 718 F. Supp. 163 (S.D.N.Y.), *aff'd,* 884 F.2d 74 (2d Cir. 1989); *Mahon v. Abrams,* No. 88-1745 (S.D.N.Y. Mar. 21, 1988); *aff'd without opinion,* 847 F.2d 825 (2d Cir. 1988); *McGee,* 669 F. Supp. 73 (S.D.N.Y. 1987).[9]

In addition, the Second Circuit independently concluded that there are no numerical discrepancies that could severely burden any candidate because "there will be thirty-one elections on March 7[, 1996]." *Rockefeller v. Powers,* App. 29a. Thus, to the extent that any requirement imposes a barrier to a candidate's access to the

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group." 28 C.F.R. § 51.52(a). Finding no discriminatory purpose or effect, on January 8, 1993, the Department of Justice pre-cleared State Party Rule 24. *See* Department of Justice Pre-Clearance Letter, Attached to Memorandum of Law of Defendants William D. Powers and New York Republican State Committee in Opposition to Plaintiffs' Motion for a Preliminary Injunction and in Support of Their Motion to Dismiss All Claims.

[9] The Southern District explained in *McGee* that "because primaries are a remedial measure designed to increase voter participation in the selection process and are not found everywhere, the main concern of the courts is that arbitrary and capricious classifications are avoided." *McGee,* 669 F. Supp. at 77 (citations omitted). Given the State Party's interest in requiring prospective delegate slates to show that they have a significant modicum of support and that presidential candidates have effective organizations that can generate grass-roots support, the Party's delegate-selection rules are certainly not arbitrary and capricious.

Republican primary ballot in a district, all candidates in that district face the same obstacle. *See, e.g., McGee*, 669 F. Supp. at 77 ("the equal protection claims of the plaintiffs may be easily disposed of because there is presented in this case no disparate treatment of participants in the primary election").

The trial court erroneously applied strict scrutiny when evaluating the Party's ballot-access requirements, relying heavily upon *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979). The Second Circuit recognized, however, that *Socialist Workers Party* only stands for the proposition that strict scrutiny applies to a ballot access discrepancy if it "significantly burdens [the voters'] fundamental right to vote or significantly impairs their ability to express political preferences." *Rockefeller v. Powers*, App. 26a.[10] That *Socialist Workers Party* must be read narrowly is confirmed by this Court's subsequent repeated admonitions that "the mere fact that a State's system creates barriers . . . tending to limit the field of candidates from which voters might choose . . . does not of itself compel close scrutiny.'" *Burdick v. Takushi*, 504 U.S. at 433 (quoting *Bullock v. Carter*, 405 U.S. 134, 143 (1972)).

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[10] In addition, *Socialist Workers Party* is factually distinct. In that case, the Court applied strict scrutiny to a statutory requirement that new political parties and independent candidates collect numerically more signatures for access to the general election ballot in a mayoral contest than in an election for statewide office, even though the number of party enrollees citywide was much smaller than the number of enrollees statewide. Plaintiffs do not contend, nor does Rule 24 require, that numerically *more* signatures be collected to qualify for the primary ballot in districts with fewer Republicans. In fact, the opposite is true. In the 11th District, which has the fewest enrolled Republicans, Rule 24 requires only 5% or 590 signatures. *See* ¶ 7 of Affirmation of Burt Neuborne in Support of Plaintiffs' Motion for Preliminary Injunction. In congressional districts with more Republicans, 1250 signatures are required.

In short, this case shares no similarity with *Socialist Workers Party*.[11] Rather, as the Second Circuit noted, the case most analogous to this case is *Hewes v. Abrams*, in which the district court applied rational-basis review in evaluating the constitutionality of New York Election Law ("NYEL") § 6-136. In *Hewes*, a Right-to-Life Party candidate for mayor launched an equal protection challenge to NYEL § 6-136(2) because the signature requirement (5% or 10,000, whichever was less) had the effect of creating a disparity among candidates for mayor in the actual percentage of signatures required to qualify for the ballot. Because of party enrollment numbers, the candidates from the major parties were required to obtain 10,000 signatures, a figure below 5% of party enrollment, while the candidate for the Right-to-Life Party had to collect signatures from 5% of the party enrollees. The Southern District held that the signature requirements plainly serve important state interests and that varying the signature requirement with the size of the voter base is consistent with the equal protection clause. *Hewes v. Abrams*, 718 F. Supp. at 167. The Southern District concluded:

> A signature cap is thus a rational accommodation of these varying interests [that are implicated]. Indeed, courts have recognized that varying the size of signature requirements based on the size of the relevant

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[11] In fact, even the relief in *Socialist Workers Party* runs counter to plaintiffs' theory. The remedy crafted in *Socialist Workers Party* to address disparate petition requirements for city and statewide office was a uniform 25,000 signature rule for *both* city and statewide office. *Id.* at 179. This Court fashioned such a remedy even though voters available to sign petitions for ballot access in Chicago are only a fraction of the voters available in the state as a whole. According to the 1980 census, the population of Illinois was about four times that of Chicago (11.5 million versus 3 million). Thus, even in the context of strict scrutiny, the remedy in plaintiffs' key case required the same absolute number of signatures despite a substantial variance in the pool of persons eligible to sign.

> voter base is rational and thus perfectly consistent with the equal protection clause. *See Mahon v. Abrams,* 88 Civ. 1745 (S.D.N.Y. March 21, 1988) (LBS), *aff'd,* 847 F.2d 835 (2d Cir. 1988) (preliminary injunction denied on plaintiffs' equal protection claim [regarding] § 6-136(2) requiring signatures of 5% of party enrolled in a given district or 1,250 signatures, which ever is less, in order to name delegates to the Republican party convention).

Id. After rational basis review, the Second Circuit panel affirmed *per curiam* "substantially for the reasons stated by Judge Haight in his thorough opinion. . . ." *Hewes v. Abrams,* 884 F.2d at 75.

As the Second Circuit easily concluded, the requirements of Party Rule 24 do not impose a "severe" burden on voters and thus do not merit strict scrutiny.

B. Rule 24 Is Clearly Reasonable and Easily Passes Rational Basis Review.

The State Party's delegate-selection rules are clearly constitutional. Traditional equal protection review begins with a presumption of constitutional validity and requires the party challenging the rule to prove that no rational basis for the rule exists. *See McDonald v. Board of Elections,* 394 U.S. 802, 809 (1969). To uphold the rule, there must be only a rational relationship between it and legitimate interests. *New Orleans v. Dukes,* 427 U.S. 297, 303 (1976). Under this analysis, the plaintiff has the clear burden to establish that "no grounds can be conceived to justify [the rule]." *McDonald,* 394 U.S. at 809 (citations omitted).

The State Party's delegate-selection requirements clearly pass rational basis review. This Court has recognized time and again that states may condition ballot access upon a showing of a "significant modicum of support." *See Jenness v. Fortson,* 403 U.S. 431, 442 (1971) (upholding 5% requirement); *Munro v. Socialist Workers*

Party, 479 U.S. 189 (1986). Party Rule 24's 1250 or 5% signature requirement per congressional district is well within the limits that have been sustained in other cases,[12] and is a reasonably simple means of establishing a significant modicum of support. Moreover, since it is convention delegates that are being selected as party leaders, Party Rule 24 should receive even more deference than corresponding state ballot-access requirements. It is reasonable for the Party to require such delegate candidates to demonstrate a significant ability to organize support within their district. *See Anderson v. Celebrezze*, 460 U.S. 780, 799 n.9 (1983) (states have "the undoubted right to require candidates to make a showing of substantial support in order to qualify for a place on the ballot . . . .").

Petitioners contend, and the trial court found, that the variation Rule 24 permits in the percentage relationship between the required number of signatures and the pool of persons eligible to sign is irrational. However, this suggestion suffers from several independently fatal flaws.

First, plaintiffs' theory arbitrarily undermines the State Party's constitutionally protected right to decide what constitutes a significant modicum of support. If the Party were to require 2500 signatures (rather than 1250), with a 5% safety valve, the percentage variation that so concerns plaintiffs would be cut in half and the absolute burden would remain in a range that the district court found is clearly permissible. Yet, plaintiffs offer no reason why the State Party cannot decide that, if delegates

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[12] A 5% signature requirement has been sustained in several cases. *See Jenness v. Fortson*, 403 U.S. 431, 442 (1971); *Munro v. Socialist Workers Party*, 479 U.S. 189, 195 (1986). Rule 24 never requires more than 5% of the eligible persons to sign petition forms and in the vast majority of districts requires far less. In fact, the State Party's rules as applied require the signatures of 5% of a district's Republicans in only 6 of New York's 31 congressional districts. *Rockefeller v. Powers*, App. 10a n.6. In 19 of New York's 31 congressional districts, less than 1.5% is required, and in 8 districts, less than 1% is required. *Id.*

show the ability to obtain 1250 signatures, that is sufficient, regardless of the size of the pool of persons eligible to sign.

Second, there is no evidence that the difficulty of obtaining 1250 signatures is directly, or even primarily, proportional to the number of Republicans in a district. Certainly, the fact that Rule 24 provides a 5% safety valve in a few districts to guard against possible undue burdens cannot be cited as a concession that the percentage of Republicans is a generally accurate proxy for burden. The trial court's assumption that such a neat and clean relationship exists is wholly unsupported.

As the disparity in the percentage signature requirements does not significantly burden the right to vote, the State Party must only demonstrate that a rational basis exists for its delegate-selection rule.[13] The rational basis for Rule 24 is to limit ballot access to delegate candidates that can demonstrate a significant modicum of support, organizational skill, and grass-roots support. Even candidates for government office—as opposed to Party office—may be required to demonstrate such "a significant modicum of support." *Socialist Workers Party,* 440 U.S. at 185. Indeed, under strict scrutiny such a requirement has been recognized as serving *compelling* interests. *Id.* Party Rule 24 is eminently reasonable and readily survives rational basis review.

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[13] This review assumes state action exists in the Party's choice of the delegate-selection rules. As the New York Attorney General stated below, however, the state of New York simply deferred to the State Party's rules because it determined that it would be unconstitutional not to do so:

> Mindful of the First Amendment associational rights of the parties, especially in light of emphatic pronouncements from the Supreme Court over the past 20 years, the New York Legislature would never presume to dictate to the parties how national convention delegates should be selected or allocated.

New York Attorney General Dec. 8, 1995 *Amicus Curiae* Appeals Brief at 7-8.

C. The State Party's First Amendment Associational Rights Compelled New York State to Defer to the Party's Delegate-Selection Rules.

The Second Circuit appropriately acknowledged that the elections at issue involve candidates for Party office—delegates to the Republican National Convention who will do more than cast a vote for the Presidential nominee; they will also "cast votes on platform issues and issues of party governance . . . [and] will vote at the convention on other issues as well." *Rockefeller v. Powers*, App. 30a. The district court preliminarily enjoined the State Party from implementing the procedures that the State Party collectively decided to use for the selection of delegates to the Republican National Convention. That injunction injected the federal courts directly into Party procedures. The district court failed to review the ballot-access requirement with due deference to the State Party's fundamental associational rights.

The state's power to regulate elections "does not justify, without more, the abridgment of fundamental rights, such as . . . the freedom of association." *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217 (1986) (citation omitted). Freedom of association "encompasses a political party's decisions about the identity of, and the process for electing, its leaders." *Eu v. San Francisco County Democratic Comm.*, 489 U.S. at 229. Specifically,

> [a] political party's choice among the various ways of determining the makeup of a State's delegation to the party's national convention is protected by the Constitution. And as is true of all expressions of First Amendment freedoms, the courts may not interfere on the ground that they view a particular expression as unwise or irrational.

Democratic Party of U.S. v. Wisconsin, 450 U.S. at 124. In light of these considerations, the courts have refused to officiate disputes between members of the same party

absent an overwhelming justification. *Id.* at 123-24 ("a State, or a court, may not constitutionally substitute its own judgment for that of [a political party"]). *See also Mahon v. Abrams*, 88 Civ. 1745 at 11 ("what is involved here is a political party primary, and particularly strong deference has been paid by the courts to the ability of a political party to determine [primary] procedures. . . .").

Thus, the State of New York not only had a rational basis, but indeed a duty, to accommodate the delegate-selection standards of the New York Republican Party. *See Tashjian*, 479 U.S. at 213-17; *Eu v. San Francisco*, 489 U.S. at 229-33. Such an affirmative duty to accommodate the State Party's duly-adopted delegate standards is sufficient to justify the action by the State that is at issue here. The equal protection clause does not constrain the Republican Party in setting its delegate-selection standards, and the First Amendment shields those standards from outside interference. Thus, the Party's delegate standards should be free of any judicial review, at least absent some compelling countervailing governmental interest such as preventing racial discrimination, which is not present here. Moreover, even if such a compelling interest were present, it would have to be balanced against the Party's own core First Amendment rights.

The district court here erroneously substituted its own views for the political judgments of the Republican Party without giving any deference to the Party's First Amendment interests. In so doing, the court intruded deeply into an area where, simply stated, it had no business. For this reason alone, the Second Circuit was correct in setting aside the district court's preliminary injunction.

III. THE DISTRICT COURT'S "REMEDY" IN THIS CASE MAKES CLEAR THAT JUDICIAL REVIEW OF A POLITICAL PARTY'S INTERNAL DELEGATE-SELECTION RULES IS NOT JUDICIALLY MANAGEABLE.

The State Party has enacted a rational rule that requires a constitutional demonstration of a significant modicum of support to qualify delegate slates for the New York presidential primary ballot. Although it expressly recognized that several possible rules would be constitutional, the district court arbitrarily adopted its own requirement.

The district court imposed a 1.41% or 1250 signature requirement in 16 of 31 congressional districts. The court alternatively held that (i) 5% everywhere would be constitutional (11/27/95 Hearing Tr. at 2), (ii) .5% would be constitutional, and (iii) its own 1.41% or 1250 formula is constitutional. Before the Court of Appeals, plaintiffs desired a .79% across the board standard. Such arbitrary distinctions fail rational basis review. *None* of these standards, moreover, is the requisite percentage adopted by the State Party.[14] As the New York Attorney General pointed out below in his brief *amicus curiae*, if allowed to stand, the district court's standard would lead to needless complications for years and would fail to solve any of Rule 24's perceived constitutional infirmities. New York Attorney General Dec. 8, 1995 *Amicus Curiae* Brief at 5. Federal courts are not com-

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[14] The wide scope of permissible rules is underscored by the district court's recognition that even its own strict equal protection theory does not require exact proportionality. *Rockefeller v. Powers*, App. 54a ("I agree that once a state has selected a percentage that represents the appropriate modicum of support it may institute a cap to liberalize ballot access.") Thus, even if federal courts were competent to decide political issues concerning delegate selection to national conventions, the district court's formula leaves statistical disparity that does not comport with its strict reading of the equal protection clause.

petent to forge such complicated primary election rules. *See, e.g., Wymbs v. Republican State Executive Comm.*, 719 F.2d 1072, 1083 (11th Cir. 1983), *cert. denied*, 465 U.S. 1103 (1984) (district court remedy was "a policy decision that federal courts are ill equipped to make . . . .").

Nothing in the equal protection clause compels such a broad usurpation of the Party's right to enact and enforce constitutional delegate-selection rules. In fact, federalism concerns have led this Court to caution that, where several alternatives would satisfy the equal protection clause, the primary responsibility for establishing a constitutional plan belongs with the states, not the federal courts.[15] *See Growe v. Emison*, 507 U.S. 25, 33-35 (1993) (federal courts should have allowed state to develop reapportionment plan even though there might not be time for judicial review before the primary); *Chapman v. Meier*, 420 U.S. 1, 27 (1975) (reapportionment); *see also Milliken v. Bradley*, 418 U.S. 717, 744 (1974) ("the scope of the remedy is determined by the nature and extent of the constitutional violation"). The State Party should be entitled to no less deference.

Although there is no means, either through the courts, the legislature, or the Republican Party, to ensure that ballot-access burdens are exactly equalized, that is not constitutionally required and, indeed, is practically impossible. It is enough that the burden, as here, is reasonable and serves its intended purpose.

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[15] Courts have also previously rejected challenges to NYEL § 6-136 that "would necessitate a substantial reworking of the electoral laws." *Hewes v. Abrams*, 718 F. Supp. at 165.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari on the grounds asserted by petitioners should be denied. Were the Court to grant certiorari, it should do so on the ground asserted by respondents in their cross-petition for certiorari in this case filed on March 13, 1996.

Respectfully submitted,

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